IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-45

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL B. BREWSTER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

OPINION BELOW

The District Court did not deliver a written opinion. Its oral opinion is contained in the Appendix at 33.

JURISDICTION

The judgment of the District Court was entered on November 3, 1970 (A. 34). A notice of appeal to this Court was filed on November 4, 1970 (A. 34-35). On March 1, 1971, this Court postponed further consideration of the

question of jurisdiction to the hearing on the merits (A. 35). *United States v. Brewster*, 401 U.S. 935 (1971). For reasons set forth in part I of the Argument, *infra*, serious questions exist as to jurisdiction under the Criminal Appeals Act, 18 U.S.C. §3731.

QUESTIONS PRESENTED

The District Court held, under the agreed facts of this case, that the Speech or Debate Clause of the Constitution, Article I, §6,[1] as interpreted by this Court in *United States v. Johnson*, 383 U.S. 169 (1966), provides a United States Senator with a constitutional shield against prosecution for alleged bribery in the performance of legislative acts (A. 33). On this direct appeal only two questions are properly before this Court:

1. Whether the Criminal Appeals Act, 18 U.S.C. §3731 (as applicable prior to its recent amendment), confers jurisdiction upon this Court not only to review a decision sustaining an affirmative defense on the merits but also to pass upon the constitutional validity of the federal bribery statute, 18 U.S.C. §201, as to which the District Court expressed no opinion.

2. Whether the District Court properly sustained the appellee's claim of legislative immunity under the Speech or Debate Clause from any prosecution arising out of his performance of legislative acts in the United States Senate.

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[1] The complete text of Article I, §6, is as follows: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*" (Italics added).

The Government's Brief, which mistakenly characterizes the decision below as one invalidating the underlying statute on which the indictment was based, suggests a different question:

> Whether (a) the Speech or Debate Clause or any other constitutional provision prohibits Congress from enacting a statute providing for the judicial trial and punishment of members who accept bribes in exchange for the performance of legislative acts and (b) if no constitutional prohibition exists, whether the statute here in issue constitutes a valid exercise of Congressional power (Govt. Br. 2).

We contend that legislative immunity, where applicable, is absolute and yields to no statute, however drawn or conceived. Accordingly, this Court should reaffirm the appellee's claim of immunity without pursuing the additional matters outlined in the Government's submission.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Government's Brief (2-4) sets forth the constitutional and statutory provisions here involved.

STATEMENT

On October 9, 1970, the United States District Court for the District of Columbia dismissed certain counts of an indictment charging appellee, while a United States Senator, with soliciting and accepting bribes from Cyrus T. Anderson, a lobbying representative of Spiegel, Inc., a large mail order company, in violation of the federal bribery statute, 18 U.S.C. §201 (A. 1-7). The essence of the charges was that appellee accepted payments in return for being influenced in the performance of official acts while a United States Senator and as a member of the Senate Committee on the Post Office and Civil Service with regard to his action, vote and decision on postage rate legislation.

In his motion to dismiss the indictment (A. 8), appellee invoked his claim of legislative immunity under the Speech or Debate Clause.[2] In the District Court it was demonstrated that the bribery charges were allegedly rooted in the appellee's deliberations with respect to postal legislation as well as his votes in committee and in the Senate. The Government disclaimed having any proof not directly related to such legislative acts (A. 26). In colloquy with counsel, the Honorable George Hart, District Judge, expressed the view that "the Speech and Debate Clause definitely intends to protect Senators and Congressmen from being questioned as to why as a Senator or a Congressman they voted in a certain way, made a certain speech in the Congress or voted a certain way in committee * * *" (A. 26). Judge Hart further observed:

> * * * [T]his Speech and Debate Clause wasn't just something that somebody stuck in this Constitution as an afterthought just to be putting words in. This matter of protecting legislators in what they did as legislators was a very important matter to the people who drafted our Constitution. It is a right you don't often hear about, but for the functioning of a true Republic it is probably as important as the first ten Amendments put together (A. 30).

Contrary to the Government's position on this appeal, the District Court did not base its decision upon any construction or invalidity of the federal bribery statute. It did not reach such issues because, under the admitted cir-

[2] Another branch of his motion (A. 9) asserted that the indictment improperly charged him with aiding and abetting himself; that the charges were unconstitutionally vague; that the underlying statutory provisions, 18 U.S.C. §201(c)(1) and §201(g), were unconstitutionally vague and contained no ascertainable standard. Since these questions were not passed upon by the District Court, they are not open to review on this direct criminal appeal. *United States v. Vuitch*, 91 S. Ct. 1294, 1300 (1971); *United States v. Blue*, 384 U.S. 251, 256 (1966).

cumstances of this case and in line with *United States v. Johnson*, 383 U.S. 169 (1966), the Speech or Debate Clause was held to provide the appellee with a complete defense:

> Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.
>
> It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the intepretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.
>
> I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7, and 9, as they apply to Senator Brewster. * * * (A. 33).

The order of dismissal (A. 34) entered on November 3, 1970 was based exclusively upon the foregoing reasons, and not on the invalidity or construction of 18 U.S.C. §201.

SUMMARY OF ARGUMENT

1. The Government has not demonstrated, and cannot demonstrate, a valid jurisdictional basis under the Criminal Appeals Act (as it existed prior to its 1970 amendment).

By appropriate motion the appellee raised the affirmative objection of the Speech or Debate Clause to judicial inquiry into his legislative acts, and the District Court's ruling was in effect a summary judgment on the merits, not within the reach of Section 3731. See *United States v. Sisson*, 399 U.S. 267 (1970); *United States v. Johnson*, 383 U.S. 169 (1966); *United States v. Findley*, 439 F. 2d 970 (1st Cir. 1971).

Our conclusion is strengthened by the fact that the District Court did not review, discuss or base its decision on any finding of invalidity of the statute in question but predicated its action on the theory that the Speech or Debate Clause, as construed in *Johnson* and as properly applied to this case, should relieve the appellee of the duty of defending himself. Under these circumstances there is no basis for a contention that the jurisdiction of this Court may be founded on the second paragraph of Section 3731.

Further, *United States v. Weller*, 401 U.S. 254 (1971), and additional precedents interpreting the "motion in bar" provision of Section 3731 make it clear that the effect of an assertion of the Speech or Debate Clause by a legislator is not the functional equivalent of a special plea of confession and avoidance — the historic test of a "motion in bar". A claim of legislative immunity in no way constitutes an admission of criminal conduct and an avoidance of the consequences, but instead is an assertion of a fundamental concept necessary to the proper functioning of our form of government. The Appellee could not be called upon to confess or deny where his legislative acts or motives are called into question in any place other than the House of which he was a member. His action in inviting the attention of the Court to the application of a Constitutional principle cannot be equated to a confession of any wrongdoing on his part, since the very inquiry necessary to an ascertainment of guilt or innocence is expressly forbidden to the court in which the proceeding was held.

2. The basic law applicable to the District Court's order is clear and incontestable under the prior decisions of this Court. The Speech or Debate Clause bars a prosecution under a general criminal statute where the legislative conduct of a member of Congress is called into question. *United*

States v. Johnson, 383 U.S. 169 (1966). This doctrine, where applicable, relieves a legislator of the burden of defending himself. *Powell v. McCormack*, 395 U.S. 486 (1969.) This case is precisely within these decisions.

Constitutional history and precedents in this Court support the fundamental importance of a reading of the Speech or Debate Clause calculated to protect the legislator against being called to account for his legislative acts or motives in any forum except the House of which he is a member. Indeed, so fundamental to the proper functioning of our Government is the Clause that, we submit, separate grants of power made in the Constitution to the House and Senate cannot be delegated either by the act of one House or by concurrent acts of the Houses as respects matters covered by that Clause. The Clause cannot be divested by any *statute*, broad or narrow, of its Constitutional function of protecting the people's elected representatives.

Although a Constitutional provision deliberately adopted to perform a vital function in the proper operation of the structure of government needs no further defense, we outline the practical considerations which support the reading which the District Court gave to the Clause and believe that the view we take is supported by the most vital considerations underlying the preservation of our system of government.

Finally, we demonstrate that the federal bribery statute 18 U.S.C. 201 is in no sense a "narrowly drawn" statute either in fact or in law, but is so sweeping as to cause it to suffer from Constitutionally impermissible overbreadth. The insubstantial nature of the Government's position is clearly demonstrated by the attempt to bring within the ambit of the "narrowly drawn" concept a charge based on a general criminal statute, lacking specificity, as a vehicle

to overturn the important concept of Constitutional protection of legislator against inquiry into their legislative acts and motives.

ARGUMENT

I.

THE JURISDICTION OF THIS COURT IS OPEN TO SERIOUS QUESTION.

In an effort to restore the inquisitorial prerogatives of the Tudors and the Stuarts, and to read the Speech or Debate Clause out of the Constitution, the Government pays scant heed to the preliminary questions of jurisdiction which were postponed to the hearing of this case on the merits. *United States v. Brewster*, 401 U.S. 935 (1971). The serious questions which we previously raised in our Motion to Dismiss or Affirm (4-13), filed in December, 1970, are not answered by unpersuasive bland assurances in the Government's Brief. We are not reluctant to address the merits. The appellee desires a conclusive adjudication of his claim under the Speech or Debate Clause, confident that this Court will fully preserve the historic sanctity of deliberations and votes in the Congress and maintain that delicate balance of governmental powers which the Constitution secures. However, the orderly administration of justice calls for examination of the jurisdictional problems and it seems clear that the Government's far-reaching submission exceeds its jurisdictional grasp under the Criminal Appeals Act.[3]

It is incumbent upon the Government to demonstrate that its appeal falls into one of the categories set forth in

[3] The 1970 liberalizing amendment to the Act, 84 Stat. 1890, has no application to this appeal (Govt. Br. 7 n.4). See *United States v. Jorn*, 400 U.S. 470, 477 n.6 (1971). As to the version of the Act applicable to this appeal, our problem is aptly summed up in the comments of Justice Harlan in *United States v. Sisson*, 399 U.S. 267 (1970): "Clarity is to be desired in any statute, but in matters of

the Act, for "the exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified." *United States v. Borden Co.*, 308 U.S. 188, 192 (1939). *See United States v. Sisson*, 399 U.S. 267, 291 (1970). Here, the Government attempts to invoke two provisions which authorize direct appeal to this Court:

> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy. * * *. 18 U.S.C. 3731.

A. THE DECISION BELOW WAS A SUMMARY JUDGMENT ON THE MERITS, PRECLUDING APPEAL.

Before considering the Government's argument that the decision below was "based upon the invalidity * * * of the statute upon which the indictment * * * is founded" (Govt. Br. 7), it must first be determined whether that decision was one "setting aside or dismissing" the indictment. That paragraph of §3731 was meant to apply only to dismissals based upon defects in the indictment or information, or in the institution of the prosecution.[4] No Government appeal lies from a pre-trial adjudication of an affirmative defense raised by motion, except under the narrow category reserved for motions in bar.

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jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *Id.* 308.

[4] *United States v. Findley*, 439 F. 2d 970, 972 (1st Cir. 1971); *United States v. Apex Distributing Co.*, 270 F. 2d 747, 755 (9th Cir. 1959). See Rule 12(b)(2), Federal Rules of Criminal Procedure. Other defenses or objections which are capable of determination with-

We pointed out in our Motion to Dismiss or Affirm that the Speech or Debate Clause is not an automatic, self-executing prohibition against the indictment of Congressmen. It does not shield conduct "that is in no wise related to the due functioning of the legislative process." *United States v. Johnson*, 383 U.S. 169, 172 (1966). Conversely, a prosecution may not attempt to "draw into question the legislative acts of the defendant member of Congress or his motives in performing them." *Id.* 185. Between these extremes lie abundant shades of gray. Whether the prosecuted activity is merely "an incidental part of the Government's case," *id.* 176, or lies at its very roots are ordinarily questions of fact determinable with the general issue, either before or during trial. As *Johnson* holds, a prosecution of a Congressman may run its normal course once it has been "wholly purged of elements offensive to the Speech or Debate Clause." *Id.* 185.[5]

When a defense is raised under the Clause by pre-trial motion, as is permissible under Rule 12(b)(1), Federal Rules of Criminal Procedure, the trial court must determine the applicability of the Clause, in advance of trial, if possible, to insure that "legislators are relieved of the burden of defending themselves." *Powell v. McCormack*, 395 U.S. 486, 505 and n.25 (1969). In this case, the required determination was facilitated and any ambiguity in the indictment was eliminated by the pre-trial disclosures of the Government. In its representations to the Court in memoranda and oral argument, the Government acknowl-

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out the trial of the general issue may also be raised by motion and determined before trial. Rule 12(b)(1), (4).

[5] The case was remanded for a new trial. *United States v. Johnson*, 383 U.S. 169, 186 (1966). On remand, the speech-oriented conspiracy count was dismissed without Government opposition but Johnson was reconvicted "on the remaining substantive counts which had nothing to do with his speech". *United States v. Johnson*, 419 F. 2d 56, 58 (4th Cir. 1969), cert. denied 397 U.S. 1010 (1970).

edged that all activities covered in the indictment related to the appellee's performance of legislative duties in the Senate. In disposing of the motion, the District Judge acted upon these stipulations and prefaced his decision as follows:

> Gentlemen, *based on the facts of this case, it is admitted* by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States (A. 33). (italics added).

As was noted in *United States v. Sisson*, "this Court has never held that an appeal lies from a decision which depends not upon the sufficiency of the indictment alone, but also on a stipulation of the parties." 399 U.S. at 285. *Sisson* suggests that the introduction of a defense on the merits supported by facts, and sustained by the trial court as part of the general issue, removes the case from the appealable category. *Id.* 286, 291, 301. Such a disposition is not bottomed on the indictment alone, as it *must* be in order to qualify for treatment under the provision of §3731 here relied upon by the Government. See, e.g., *United States v. Wayne Pump Co.*, 317 U.S. 200, 208 (1942); *United States v. Borden Co.*, 308 U.S. 188, 193 (1939); *United States v. Hastings*, 296 U.S. 188, 194 (1935). As this Court observed in dismissing the appeal in *Sisson*:

> The decision below rests on affirmative defenses, which the Court thought, Sisson could claim because of his beliefs. It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses. * * * In short, this indictment cannot be taken as insufficient for on the one hand, it recites the necessary elements of an offense and on the other hand, it does not allege facts which themselves demonstrate the availability of a constitutional privilege. *Id.* 399 U.S. at 288-289.

Here the District Court sustained the appellee's claim of legislative immunity not solely upon the averments of the indictment but also upon the Government's factual disclosures. Unlike *Sisson* and *United States v. Jorn*, 400 U.S. 470, 473-476 (1971), the appellee was not placed in jeopardy in a constitutional sense. There can be no question, however, that under the District Court's view of the law, had the case proceeded to trial the same facts would have compelled an acquittal from which no Government appeal would lie. See, e.g., *Fong Foo v. United States*, 369 U.S. 141, 142 (1962).

By its action the District Court held, in effect, that this case could not proceed "wholly purged of elements offensive to the Speech or Debate Clause." *United States v. Johnson*, 383 U.S. 169, 185 (1966). If such action upon admitted facts is non-appealable, the result follows no matter when that action is taken. As Judge (later Justice) Van Devanter once said, "it would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end." *United States v. Dietrich*, 126 Fed. 676, 678 (C.C.D. Neb. 1904). With these words, a bribery prosecution of a Senator was dismissed when the Government revealed that he received the payments before taking his seat in the Senate. Surely "there is little functional justification for reviewing a trial court's action in entering judgment as soon as it becomes apparent that the case must fail, since a judgment of acquittal at the close of the evidence would admittedly not be reviewable, even where the trial court offered no reason for its action."[6]

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[6] Note, *Mandamus to Review Judgments of Acquittal in Federal Courts*, 71 YALE L.J. 171, 173 (1961). "The power of the court to act upon facts conceded by counsel is as plain as its power to act upon facts produced." *Best v. District of Columbia*, 291 U.S. 411, 415 (1934). Dismissals frequently occur where the Government's own

Viewed in this perspective, the action of the District Court constitutes a summary judgment on the merits,[7] singling out and adjudicating an affirmative defense in advance of trial and thereby eliminating unjustifiable expense and delay while achieving a just determination. See Rule 2, Federal Rules of Criminal Procedure. Our conclusions are fortified by *United States v. Findley*, 439 F. 2d 970 (1st Cir. 1971), decided after this Court postponed jurisdiction in the present case. In *Findley*, the defendant was indicted under 50 U.S.C. App. §462 for refusal to report for induction as ordered. His pre-trial motion to dismiss was granted on the ground that the order was invalid because his draft board had given no reason for refusing to reopen his classification. Dismissing the Government's appeal, the First Circuit held "that although labelled a motion to dismiss, under the rationale of *Sisson* the [trial] court's action was in reality an acquittal, or, more precisely, a summary judgment on the merits not appealable anywhere under Section 3731." *Id.* 972. Chief Judge Aldrich concluded his review of precedents with the observation "that if a dismissal is a result of the showing of evidentiary facts dehors the indictment which, if established at a trial, would constitute a defense on the merits, the court's ruling, however described, is in effect an acquittal, and thus not within the intended purpose of the appeals statute." *Ibid.* The soundness of this rule is borne

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evidence at trial indicates the existence of an iron-clad defense. See, e.g., *McGuire v. United States*, 152 F. 2d 577, 580 (8th Cir. 1945); *United States v. Maryland Co-op. Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D.D.C. 1956).

[7] In a civil context, summary judgment was properly granted to a Senator where, as here, the "record before the District Court contained unchallenged facts of a nature and scope sufficient to give [him] an immunity against answerability in damages for actions taken in the course of [his] legislative activities." *Dombrowski v. Burbank*, 358 F. 2d 821, 824 (D.C. Cir. 1966), aff'd *sub. nom. Dombrowski v. Eastland*, 389 U.S. 82 (1967).

out by negative impact upon the administration of justice which a contrary approach might occasion:

> If an appeal will lie in the present case, which it cannot if the defendant waits and subjects himself to jeopardy, informed counsel believing they have a defense on the merits will henceforth protect their clients by avoiding an expediting procedure otherwise beneficial to all concerned, and only ignorant and ill-advised defendants will subject their defense on the merits to a government appeal. We will not adopt such a penalizing construction of the statute. *Id*, 974.

2. What has been said of the "dismissing any indictment" provision also disposes of the Government's contention that the case is appealable under the "motion in bar" branch of the Criminal Appeals Act. The latter provision was recently construed restrictively in *United States v. Weller*, 401 U.S. 254 (1971), in line with the common law antecedents of a special plea in bar. *Id.* 259. As Justice Holmes once remarked, the Criminal Appeals Act "uses technical words, 'special plea in bar' and we see no reason for not taking them in their technical sense." *United States v. Storrs*, 272 U.S. 652, 654 (1926). "Even under the most expansive view, however, a motion in bar cannot be granted on the basis of facts which would necessarily be tried with the general issue in the case." *United States v. Sisson*, 399 U.S. 267, 301 (1970). See *United States v. Weller*, 401 U.S. 254, 259-260 (1971). Except for matters in confession and avoidance, "there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact." *United States v. Murdock*, 284 U.S. 141, 151 (1931). Motion in bar jurisdiction thus does not turn upon the extent to which the facts are undisputed or resolved by stipulation, cf., *United States v. Sisson*, *supra* at 284-286, "for this would mean the parties

and the lower court simply could foist jurisdiction upon this Court." *Id.* 287.

B. THE DECISION BELOW WAS NOT BASED UPON THE INVALIDITY OF THE FEDERAL BRIBERY STATUTE.

We turn now to the Government's main contention that the decision below was "based upon the invalidity * * * of the statute upon which the indictment * * * is founded" (Govt. Br. 7). The District Court expressed no opinion as to the validity of the federal bribery statute, 18 U.S.C. §201, but spoke instead of "immunity under the Speech and Debate Clause" in terms of a shield "from any prosecution for alleged bribery to perform a legislative act" (A. 33). A "shield" implies an affirmative defense,[8] as does "immunity." These terms readily correspond to declarations that the Speech or Debate Clause is the source of "legislative immunity" providing Congressmen with "a defense on the merits" and relieving them "of the burden of defending themselves." *Powell v. McCormack*, 395 U.S. 486, 502, 503, 505 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). Judge Hart's "constitutional shield" approach to the case, we submit, clearly negates the proposition that he "based" his decision upon the invalidity of the underlying statute. Rather, the District Judge rightly perceived a defense so strong as to eliminate the need to probe for weakness in the statutory underpinnings of the indictment.

The only precedent which the Government can muster for its "invalidity" theory of jurisdiction consists of a footnote passage in *United States v. Knox*, 396 U.S. 77, 79 n. 2 (1969). As the Government reads *Knox*, a judgment sustaining the appellee's claim of legislative immunity must

[8] Judge Hart's terminology echoes a statement by his colleague, Judge Youngdahl, who described the Speech or Debate Clause "as a shield against executive interference with the individual legislator * * *." *McGovern v. Martz*, 182 F. Supp. 343, 346 (D.D.C. 1960).

be treated as a decision that the federal bribery statute cannot be constitutionally applied to any member of Congress who accepts a bribe in exchange for legislative conduct (Govt. Br. 8-9).

This theory is unconvincing on several grounds: *First*, it assumes that the federal bribery statute (as distinguished from the indictment) reaches legislative conduct—a matter which the District Court did not necessarily decide. *Second*, jurisdiction was apparently unquestioned in *Knox*. Probable jurisdiction was noted, not postponed as in the present appeal. *Third*, the "invalidity" branch of the Criminal Appeals Act was invoked by this Court, apparently *sua sponte*, in order to reserve the "motion in bar" provision for "full dress consideration" later the same term in *United States v. Sisson*, 399 U.S. 267 (1967). Neither party to the appeal suggested it. *Fourth*, Judge Hart's opinion was "based on the facts of this case," as admitted by the Government (A. 33). This was manifestly not so in *Knox*, 396 U.S. at 79 n.2. *Fifth*, the authorities marshalled in support of the Knox footnote all dealt with civil appeals, making *Knox* somewhat difficult to square with later admonitions "that the Criminal Appeals Act should be construed strictly against the Government's right of appeal," *United States v. Sisson*, *supra* 399 U.S. at 286, and that appeals by the Government in criminal cases "are something unusual, exceptional, not favored." *Id.* 291. See also *Will v. United States*, 389 U.S. 90, 96-97 (1967); *Carroll v. United States*, 354 U.S. 394, 399-400 (1957). Civil appeals are not governed by considerations "supporting the canon of strict construction traditionally applied to this statute." *United States v. Jorn*, 400 U.S. 470, 476 (1971). *Finally*, the argument which the Government derives from *Knox* — that the federal bribery statute was "invalidated" as applied to appellee — is little more than a veiled admission that the District Court sustained a defense on the merits.

To assume or infer that the decision of the District Court was "based" upon the invalidity of the underlying statute is not enough. There must be "an expression of opinion in some form as to manifest clearly whether its act proceeded upon a construction of the statute" before this Court may assume jurisdiction. *United States v. Carter*, 231 U.S. 492, 494-495 (1913).[9] A direct appeal will not lie where the District Court has considered the invalidity or construction of the statute but has rested its decision on some other ground. *United States v. Borden Co.*, 308 U.S. 188, 193 (1939). Jurisdiction is limited to those cases where the dismissal is "based" *solely* upon the invalidity or construction of the underlying statute. *United States v. Hastings*, 296 U.S. 188, 194 (1935). To so characterize the decision below "requires a straining that is not permissible in the light of the principles and history concerning criminal appeals" under the Criminal Appeals Act. *Carroll v. United States*, 354 U.S. 394, 405 (1957).

C. THE DECISION BELOW WAS NOT ONE SUSTAINING A MOTION IN BAR.

Until the recent holding in *United States v. Weller*, 401 U.S. 254 (1971), there was arguable support for the Government's position that this appeal falls within the "motion in bar" provision of the Criminal Appeals Act. A claim of legislative immunity does bear a superficial resemblance to a "motion in bar." *Weller* itself places a "claimed immunity because of prior self-incriminatory testimony or a

[9] Justice Frankfurter once wrote: "Other questions may be imbedded in the case which may eventually come to the surface. But they are not to be brought to the surface here under the limited, specific review given by the Criminal Appeals Act. It is to such implicit questions of pleading and to statutory or constitutional questions not passed upon by a district court, that Mr. Justice Hughes had reference when he said, 'The Government's appeal does not open the whole case.'" *United States v. Petrillo*, 332 U.S. 1, 15 (1947) (concurring opinion).

statutory grant of immunity," in the "motion in bar" category. 401 U.S. at 260.[10] The Speech or Debate Clause, if pleaded, "not only provides a defense on the merits but also protects a legislator from the burden of defending himself." *Powell v. McCormack*, 395 U.S. 486, 501-503 (1969). See *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). If the test of "motion in bar" jurisdiction was merely "whether the judgment is one which will end the case and exculpate the defendant," *United States v. Mersky*, 361 U.S. 431, 441-442 (1960) (Brennan, J., concurring), then the decision below might be reviewable by that standard. *United States v. Blue*, 384 U.S. 251, 254 (1966); *United States v. Hark*, 320 U.S. 531, 536 (1944). See *United States v. Sisson*, 399 U.S. 267, 326-346 (1970) (White, J., dissenting).

However, as we explained in our Motion to Dismiss or Affirm (10-11), a special plea in bar — the functional equivalent of a "motion in bar" — is restricted to (1) matters of confession and avoidance which (2) occur *after* the events charged in the indictment and (3) not admissible under the general issue. The *Weller* decision clearly reinforces our position. The Court noted that it "has never settled on a definitive interpretation of what constitutes a 'motion in bar'," and then announced the following standard:

> A characteristic common to all these [common law] definitions is that a special plea in bar did not deny that a defendant had committed the acts alleged *and that the acts were a crime*. Rather, it claimed that

[10] In two cases cited for this proposition in the *Weller* opinion, *United States v. Hoffman*, 335 U.S. 77, 78 (1948), and *United States v. Monia*, 317 U.S. 424 (1943), neither the Court nor the parties discussed the question of jurisdiction. In each case, statutory immunity was not bound up with the issue of guilt or innocence, as here, but represented a new development intervening between the offense and the indictment.

> nevertheless he could not be prosecuted for his crime because of some extraneous factor. *A situation in which the defendant claims that his act was simply not a crime would be beyond the scope of this test.* *Id.* 401 U.S. at 260. (italics added).

Then the Court concluded:

> Testing the appellee's motion to dismiss by this standard, we think it plain that it cannot qualify as a 'motion in bar.' The appellee did not deny that he refused to submit to induction, *but he claimed that his conduct was not a crime* because of the prior denial of counsel. *He has not confessed to a crime and claimed immunity from prosecution; he argues that he has committed no crime.* *Id.* 261. (italics added).

Although it is perfectly true, as the Government contends, that the appellee has claimed legislative immunity from prosecution, the element of "confession" is utterly lacking. The Appellee has consistently denied that his conduct violated any law; he maintains that he is charged with no act which may constitutionally be made a crime, even if such act occurred. *Weller* did not hold that an "avoidance" alone would bring the case within the limited confines of the "motion in bar" provision.

Contrary to the Government's assertion, the defense under the Speech or Debate Clause does not introduce an "extraneous factor" of the sort depicted in *Weller*. It is not an intervening development which rescues an otherwise culpable defendant from criminal liability. The claim asserted by the appellee denies the attachment of criminal consequences to his conduct but does not introduce new matter as is invariably the case with former jeopardy, pardon, running of limitations, a subsequent grant of immunity and the other examples cited in the *Weller* opinion, 401 U.S. at 261. It is a defense "so intertwined with the general

issue that it must be tried with the general issue." *United States v. Sisson*, 399 U.S. 267, 302 (1970).

At common law, defenses contemporaneous with the offense charged were tried with the general issue and could not be raised by special plea in bar. See, e.g., *Sorrells v. United States*, 287 U.S. 435, 452 (1932) (entrapment). Indeed, it was considered improper to set up a defense admissible under the plea of not guilty. *United States v. Sisson, supra* at 301; *United States v. Murdock*, 284 U.S. 141, 150 (1931). "A special plea in bar is appropriate where defendant claims former acquittal, former conviction, and pardon but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact." *United States v. Murdock, supra* 284 U.S. at 151 (citations omitted). See also *United States v. Weller, supra* 401 U.S. at 261 n.12; *United States v. Sisson, supra* 399 U.S. at 300 n.53.

Accordingly, the argument that this is "a classic case of confession and avoidance" (Govt. Br. 10) cannot be sustained under *Weller* or any other formulation.

II.

THE DISTRICT COURT PROPERLY SUSTAINED THE APPELLEE'S CLAIM OF LEGISLATIVE IMMUNITY UNDER THE SPEECH OR DEBATE CLAUSE.

A. THE HOLDING IN *JOHNSON* SUPPORTS THE DECISION BELOW.

1. On the merits, this case gives rise to a single question: whether the Speech or Debate Clause provides a Senator with a complete defense to a bribery prosecution necessitating inquiry into his deliberations and votes upon pending legislation. Judge Hart, himself no stranger to

the Speech or Debate Clause,[11] regarded this question as having been answered in the affirmative in *United States v. Johnson*, 383 U.S. 169 (1966). He held "that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act" (A. 33). Since the controlling principles of *Johnson* were correctly applied below, this Court's task is completed and collateral argument is wholly beside the point. Under the strictures of the Criminal Appeals Act, "this Court reviews judgments, not arguments assailing them," *United States v. Shirey*, 359 U.S. 255, 261 n. 5 (1959).

Johnson involved a conspiratorial attempt on the part of a Congressman and others to exert influence on the Department of Justice to obtain dismissal of mail fraud indictments pending against officers of a savings and loan company. As part of the general scheme to influence the Department, Congressman Johnson was charged with accepting payments in return for making a speech on the floor of the House of Representatives. The prosecution alleged that Johnson was influenced in his official capacity by receiving substantial sums in the form of "campaign contributions" and "legal fees" for his actions. *United States v. Johnson*, *supra* 383 U.S. at 172. Although the Government did not proceed under the federal bribery statute, as it does here, it did undertake to prove that the payments "were made simply to 'buy' the Congressman." *Ibid.*

At trial the bulk of the case dealt with Johnson's money transactions with co-conspirators and with dealings with

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[11] See his opinion in *Powell v. McCormack*, 266 F. Supp. 354, 355 (D.D.C. 1967), aff'd 395 F. 2d 577 (D.C. Cir. 1968), aff'd in part 395 U.S. 486 (1969).

the Department of Justice. But evidence about his speech caused the very sort of inquiry proscribed by the Speech or Debate Clause.

> The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissible evidence. The attention given to the speech's substance and motivation was not an incidental part of the Government's case, which might have been avoided by omitting certain lines of questioning or excluding certain evidence. The conspiracy theory depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech. *Id.* 176-177.

Reviewing the Clause in historical perspective, and in the light of its two prior encounters with it,[12] this Court reaffirmed "that the legislative privilege will be read broadly to include not only 'words spoken in debate,' but anything 'generally done in a session of the House by one of its members in relation to the business before it'," and that "an unworthy purpose does not destroy the privilege." *Id.* 180. The immediate question was whether the Clause was broad enough to embrace "a criminal prosecution based upon an allegation that a member of Congress abused his position by conspiring to give a particular speech in return for remuneration from private interests." *Ibid.* The Court answered in the affirmative, finding the Clause to be unmistakably applicable:

> However, reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to *prevent it from being made the basis of a criminal charge* against a member of Congress of con-

[12] *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

spiracy to defraud the United States by impeding the due discharge of government functions. The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and * * * that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry. *Ibid.* (italics added).

After explaining that legislative conduct cannot be made the foundation of civil or criminal proceedings against a disfavored Congressman, however corrupt his motives, *id.* 183-184, the Court summarized its decision as follows:

> We hold that a prosecution under a general criminal statute dependent upon such inquiries [into legislative acts or motives] necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. ***And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.*** *Id.* 184-185 (italics added).

2. The italicized sentence is the entire foundation of the Government's appeal. Seizing upon what was *not* decided in *Johnson*, and disregarding all else, the Government insists that its prosecution was "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members". *Id.* 185. It argues that Congress possesses unfettered con-

stitutional power to enact a statute attaching criminal sanctions to a member who may accept payments in exchange for performance of legislative acts and that the federal bribery statute under which the appellee was indicted represents a "narrowly drawn" exercise of such assumed power (Govt. Br. 10-12).

Apart from the "narrowly drawn statute" argument, the Government does not undertake to distinguish this case from *Johnson*. It plainly accepts the holding in *Johnson* "that the Speech or Debate Clause bars a prosecution under a general criminal statute (in that case for conspiracy under 18 U.S.C. §371) which calls into question the *legislative conduct* of a member of Congress" (Govt. Br. 10-11) (italics added). It concedes as it must under *Johnson* and more recent decisions that "[c]ommittee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it'." (Govt. Br. 11 n.5).[13] Nor does the Government deny that a charge of "accepting a bribe" was central to *Johnson* no less than it is here. *Ibid.* Finally, it observes that "immunity conferred by the Clause was intended to prevent legislative intimidation by, *or accountability to*, other branches of government" (Govt. Br. 20) (italics added).

In short, the Government has no quarrel with *Johnson*, either as a precedent or as applied by the District Court, except for its argument based upon the non-commital dictum in *Johnson* — *an argument which the District Court did not reach*. Having decided in reliance upon *Johnson* that the constitutional shield of the Clause protects the appellee, the District Court found it unnecessary to examine the sword of the statute to see whether it was "nar-

[13] Quoting from *Powell v. McCormack*, 395 U.S. 486, 502 (1969) and *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

rowly drawn". Thus the question left open in *Johnson* was not passed upon below and is here on direct appeal as a matter of first impression for this Court, together with a host of component issues which have never been resolved. If the question left open in *Johnson* still remains open, which should not be lightly assumed,[14] it becomes necessary to pursue the Government's inquiry through an unexplored thicket of constitutional provisions in which the most fundamental powers of the Senate are rooted. Then the legislative history, scope, and interpretation of the federal bribery statute must be ascertained and applied to an unprecedented set of facts. Finally, this Court would be obliged to decide — all without benefit of a precise decision on the point — whether this important Act of Congress as construed constitutes "a narrowly drawn statute" within the intendment of *Johnson* and, if so, whether it can be squared with the constitutional prohibition expressed in the Speech or Debate Clause.

These delicate topics need not be examined at present. *Johnson*, whatever its limitations, does extend to all prosecutions of unquestioned similarity. By leaving an open question in one case this Court is not obliged to tackle it in another merely because, like Mount Everest, it is there. This is especially true where the line of inquiry, if pushed to its conclusion, ultimately requires a decision upon the constitutional validity of an Act of Congress — "the gravest and most delicate duty that this Court is called upon to perform." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963). In every appeal, but particularly in cases

[14] The Speech or Debate Clause has been illuminated in two subsequent opinions. *Powell v. McCormack*, 395 U.S. 486, 501-506 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). In *Powell, supra* at 502-503, the Court indicated that the Speech or Debate Clause "not only provides a defense on the merits but also protects a legislator from the burden of defending himself."

brought up under the Criminal Appeals Act, this Court's "inquiry is limited to the particular question decided by the court below." *United States v. Mescall*, 215 U.S. 26, 31 (1909). See *United States v. Keitel*, 211 U.S. 370, 398 (1908). "The Government's appeal does not open the whole case." *United States v. Borden Co.*, 308 U.S. 188, 193 (1939).[15] Such limitations must be heeded. Open questions should be reserved for open cases.

The holding of the District Court, we submit, properly avoided a direct confrontation between an Act of Congress and the Speech or Debate Clause. By adhering closely to the precedents of this Court, which have uniformly recognized legislative immunity under the Clause without questioning the statutory basis of the underlying proceeding, Judge Hart was acting in the best traditions of judicial restraint. As this Court has said on countless occasions, it is not a judicial function "to decide abstract, hypothetical or contingent questions * * * or to decide any constitutional question in advance of the necessity for its decision." *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 284 (1969), and cases cited. As said in *United*

[15] See n.9, *supra*. See also *United States v. Vuitch*, 91 S. Ct. 1294, 1300 (1971); *United States v. Petrillo*, 332 U.S. 1, 5 (1947). The Criminal Appeals Act vests "this Court with jurisdiction only to review the particular question decided by the Court below for which the statute provides." *United States v. Keitel*, 211 U.S. 370, 398 (1908). Under motion in bar jurisdiction, a determination as to the construction of the federal bribery statute or its validity as a "narrowly drawn statute passed by Congress in the exercise of its legislative power" would seem outside the scope of this Court's review. *United States v. Kissel*, 218 U.S. 601, 604 (1910); *United States v. Mason*, 213 U.S. 115 (1909). See Stern & Gressman, *Supreme Court Practice* 43 (4th ed. 1969). If so, then this Court's jurisdiction (assuming its existence) extends only to the specific question whether the shield of the Speech or Debate Clause, as construed in *Johnson*, is also controlling here. Cf., *United States v. Mason*, *supra*.

States v. Petrillo, 332 U.S. 1, 5 (1947),[16] and repeated again last term, this Court has "consistently refrained from passing on the constitutionality of a statute until a case involving *it has reached a stage where the decision of a precise constitutional issue is a necessity.*" *Sanks v. Georgia*, 401 U.S. 144, 151 (1971). If the principles of *Johnson* are controlling, as the District Judge held, then this case does not warrant the dangerous excursion which the Government invites.

3. There is really no difference between what was expressly forbidden by *Johnson* and what was attempted here. The essence of the indictment is the allegation that the appellee, in his capacity as a United States Senator and as a member of a Senate committee considering postal rate legislation, "corruptly asked, solicited, sought, accepted, received and agreed to receive" various sums from a registered lobbyist and another "in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation." See counts 1, 3, 5, 7, 9 (A. 1-7). Certainly Judge Hart's application of the Speech or Debate Clause to this indictment involved no unwarranted expansion of the principles articulated in *Johnson*. The contrary is true. If the appellee's motion to dismiss had been overruled, his legislative actions, votes, and decisions on postal legislation would have been thrown open to searching inquiry in the courtroom — and "that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *United States v. Johnson*, 383 U.S. 169, 180 (1966). Moreover, as this Court has said on two occasions since *Johnson*, "the Clause not only provides a defense on the merits *but also protects a legislator from the burden of defending himself.*"

[16] Spoken in the context of the Criminal Appeals Act.

Powell v. McCormack, 395 U.S. 486, 502-503 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (italics added). Forcing the appellee to stand trial, thereby making him accountable to a jury for his actions, votes, or decisions in the United States Senate on postal rate legislation, would sabotage the whole purpose of the Clause — "to insure that legislators are not distracted from or hindered in the performance of their task by being called into court to defend their actions." *Powell v. McCormack, supra* at 505.[17]

Certainly *Johnson* affords no basis for the argument that federal bribery prosecutions must be excepted from its reach. To be sure, Congressman Johnson was not charged under the federal bribery statute. He was, however, prosecuted for bribery in fact if not in terms. The indictment itself, although not based upon the federal bribery statute, charged him with accepting compensation for making a speech — a bribe, in other words.[18] The charge was calculated to support proof that bribe payments "were made

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[17] The refusal of a District Court to dismiss the "bribed speech" charges against Congressman Johnson, *United States v. Johnson*, 215 F. Supp. 300 (D. Md. 1963), came in for scholarly criticism even prior to this Court's decision. "The district court in Johnson held that the privilege does not apply when a bribe is involved because it thought that 'immunizing' legislators who 'sold themselves' would ironically subvert the purpose of the privilege, namely, the promotion of the independence of the legislature. However, the privilege was primarily intended to 'immunize' the legislative branch from interference by the executive and judicial branches. If the district court's reasoning had prevailed, the judiciary would investigate legislative motivation whenever bribery was alleged by the executive. Although the legislature would be protected from interference by individuals, its independence of the other two governmental branches would be lost." Note, 78 HARV. L. REV. 1473, 1475 (1965).

[18] To use the Government's parlance, "*Johnson* involved a Congressman's conviction for conspiring to impair lawful government functions *by accepting a bribe* to make a speech on the floor of the House of Representatives." (Govt. Br. 11 n.5) (italics added).

simply to 'buy' the Congressman."[19] No meaningful distinction exists between such conclusion in *Johnson* and the language of the federal bribery statute, speaking of receiving "anything of value * * * in return for being influenced in [the] performance of any official act".[20]

From its very inception the *Johnson* case proceeded as if it had been brought under the federal bribery statute. The trial and appellate courts differed over the Speech or Debate Clause, but both observed the plain relevance of the federal bribery statute to the prosecution of Congressman Johnson. See *United States v. Johnson*, 337 F. 2d 180, 189 (4th Cir. 1964), reversing 215 F. Supp. 300, 306 (D. Md. 1963).[21] Both rulings, as the Government itself contended in this Court, stand for the proposition "that, for the purpose of determining the applicability of Article I, Section 6, there is no material difference between a prosecution for accepting a bribe and one for conspiring to defraud the United States by accepting a bribe."[22]

Not surprisingly, then, the Government approaches this case with many of the same arguments and policy considerations unsuccessfully advanced in *Johnson*. Indeed, the Government presents virtually the same question.[23] In its petition for certiorari and brief on the merits in *Johnson*, for example, the Government complained that

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[19] *United States v. Johnson*, 383 U.S. 169, 172 (1966).

[20] 18 U.S.C. §201.

[21] So concluded the legal scholars who reviewed the decision of the Court of Appeals. See e.g., Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335 (1965); Note, 78 HARV. L. REV. 1473 (1965).

[22] Reply Brief of the United States, at 6, *United States v. Johnson*, 383 U.S. 169 (1966).

[23] The *only* question presented in *Johnson* was whether the Speech or Debate Clause "bars criminal prosecution of a Congressman for accepting a bribe to make a speech in Congress." Brief of the United States, at 2, *United States v. Johnson*, 383 U.S. 169 (1966). In the

the reasoning of the Court of Appeals "might be thought to bar any prosecution of a Congressman for bribery even if what the Congressman sold was his vote rather than his speech."[24] The net effect, it argued, was to cast doubt upon the federal bribery statute[25] and to undermine the constitutional power of Congress to provide for punishment of bribe-taking members.[26] This prompted the Government to argue that the antecedent conduct of accepting a bribe can be "questioned", within the meaning of the Clause, even if the influenced conduct cannot.[27] In support of these now-familiar refrains, the federal bribery statute was presented to this Court as a clear manifestation of the intent of Congress to bring corrupt members before a jury.[28] The Government perceived in *Johnson*, as it does here, a supposed "Congressional preference for criminal prosecution, rather than a legislative proceeding," thus placing "a Congressman's conduct under inquiry only if a grand jury determines that there is probable cause to believe that he has betrayed the public trust."[29]

Therefore, this Court, in deciding *Johnson*, was by no means unaware of its parallel impact upon future prosecu-

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present appeal the making of a speech in *Johnson* is not claimed to be a distinguishing factor (Govt. Br. 11 n.5).

[24] Petition of United States for Certiorari, at 7, *United States v. Johnson*, 383 U.S. 169 (1966). Brief, at 7-9, *supra* n.23.

[25] Petition for Certiorari, at 7, *supra* n.24.

[26] Brief, at 31, *supra* n.23.

[27] Petition for Certiorari, at 8, *supra* n.24; Brief, at 9-13, *supra* n.23.

[28] Petition for Certiorari, at 9, *supra* n.24; Brief, at 8, *supra* n. 23; Reply Brief, at 4-5, *supra* n.22.

[29] Petition for Certiorari, at 9, *supra* n.24; Brief, at 36-37, *supra* n.23. The Petition added: "It gives accused legislators the benefits of all the constitutional guarantees applicable in the trial of criminal cases. It provides an impartial tribunal to protect an unpopular Congressman from a politically motivated legislative tribunal. And it proceeds on the sound premise that in matters involving wrongdoing outside the halls of Congress, the courts provide a better forum

tions under the federal bribery statute. It expressly considered — and rejected — the argument that the Speech or Debate Clause does not touch prosecutions "founded on "the antecedent unlawful conduct of accepting or agreeing to accept a bribe'." *United States v. Johnson, supra,* 383 U.S. at 182. Observing that the Clause, designed to prevent accountability to other branches of government, "is framed in the broadest terms," *id.* 182-183, the Court rested its conclusion upon an opinion in a century-old English case[30] "that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to *anything* they may do or say in the House." *Id.* 183 (italics added). This is hardly the sort of language which opens the door to bribery prosecutions under one statute while closing it as to another.

The thrust of *Johnson* is to proscribe the examination of a legislator's motives under the guise of a bribery prosecution, under any "general criminal statute dependent upon such inquiries * * *." *Id.* 184. The opinion does not exempt the federal bribery statute, with its all-inclusive application to any "public official". Because of the central import-

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for determining guilt or innocence." Petition for Certiorari, at 9-10. (This pseudo-justification has been resurrected here. See Govt. Br. 27-29.)

[30] *Ex parte Wason*, L.R. 4 Q.B. 573, 577 (1869). Of greater significance to the present appeal was the footnote discussion (383 U.S. at 182 n.13) of *Strode's* Case, which involved a criminal prosecution in 1512 of a member of Parliament for introducing legislation in which he had a financial interest. To our knowledge no other member of Parliament (much less any member of Congress prior to *Johnson*) has since been prosecuted in a court of law for bribery or corruption in connection with his legislative duties. As the discussion in *Johnson* makes clear, Parliament later released Strode by a special bill declaring his conviction to have been utterly void and of no effect. The law of *Strode's* Case was legislatively adopted in 1667 by the formal resolutions of both Houses of Parliament. The criminal prosecution of a member for his graft-induced vote would be unthinkable today.

ance of the federal bribery statute to the Government's appeal, and its oft-repeated apprehensions as to its survival, it would have been a simple matter for this Court to have identified it as a "narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *Id.* 185. That statute might have been contrasted with the statute under which Congressman Johnson was actually prosecuted, as if to assure the Government that it had a clear alternative for prosecuting Congressman without running afoul of the Clause. But the Court did not draw any such distinctions, not because the federal bribery statute was not a factor in *Johnson*, but because no such distinction was warranted.

We respectfully submit that the federal bribery statute should not be treated as a wedge between this case and *Johnson*. It ill-behooves the Government to disavow on this occasion the comparisons which it so deliberately drew in *Johnson*. If the mere difference in labels[31] permits the Government to prosecute the same charges under one statute but not the other, then the Speech or Debate Clause as "an important protection of the independence and integrity of the legislature", *id.* 178, is a hollow one indeed.

Few provisions of our Constitution are as sparsely litigated as that Clause. *Id.* 179. And yet this is the sixth time — the fourth during the last five years — that the Clause has been here for a new reading. We believe that this Court has already spoken with clarity and finality so that the specific application of its teachings may be safely

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[31] As this Court said in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), cited in *Johnson* at 383 U.S. 182 n.12: "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations." So also, bribery.

committed to the wisdom of federal judges. Having relied upon *Johnson*, the District Court should be affirmed on that basis without engaging in a reappraisal of matters so recently considered.

B. THE SPEECH OR DEBATE CLAUSE BARS JUDICIAL INQUIRY INTO MOTIVATIONS OF A SENATOR'S VOTE OR DECISION.

1. A fundamental lack of appreciation for the Speech or Debate Clause, as a vital check upon the executive and judicial branches, pervades the Government's entire position. This is nowhere more evident than in its interesting, well-researched but unnecessary monologue upon the historic efforts in Parliament and in the colonial assemblies to secure plenary authority to discipline members for misbehavior (Govt. Br. 12-22). We need not look beyond Article I, Section 5 of the Constitution to find that either House is clothed with power to "punish its Members for disorderly Behavior." And we have very little doubt that either House of Congress may discipline a member caught selling his vote for financial reward.[32]

What we cannot understand, and cannot accept, is the strange argument that it was a dual function of the Speech or Debate Clause to curb legislative abuses as well as to insure legislative independence. On one hand, the Government declares that the "immunity conferred by the Clause was intended to prevent legislative intimidation by, or accountability to, other branches of government" (Govt. Br. 20). It endorses this Court's statement that the Clause "insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." *Powell v. McCormack*, 395 U.S. 486, 503 (1969). On the other hand, the Government points to the corruption and chi-

[32] See notes 36 and 68, *infra*.

canery which poisoned the halls of eighteenth century Parliament; the abuses of *lex parliamenti*; the amenability of venal members to bribe-taking; the proliferation of privileges, legitimate and bizarre; the John Wilkes episode. The second step in its argument is an assertion that the Framers "were fully aware" of "the dangers of unfettered and corrupt use of legislative power" and "were acutely troubled that this power could be grossly abused and corrupted" and worried about legislative encroachment (Govt. Br. 19-20). We believe that these concerns are plainly mirrored in the Section 5 power of each House to "punish its Members for disorderly Behavior and, with the concurrence of two thirds, expel a member."

The third step consists of an assertion that the apprehensions of the Framers over legislative abuses "coalesced in the adoption of the Speech or Debate Clause." (Govt. Br. 20) As we shall demonstrate, the Clause was adopted despite — not because — of such abuses. Indeed, this Court has found it "significant that legislative freedom was protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess." *Tenney v. Brandhove*, 341 U.S. 367, 375 (1951). As we move into the fourth step of the Government argument, the Clause as a shield of legislative immunity is translated into an instrument of affirmative power, not merely in the hands of "either House" but available for use by Congress at large. Thus we are told:

> In providing that speech or debate in either *House* 'shall not be questioned in any other Place,' it was thus not simply meant that Congress could impose sanctions on the unruly legislator or on one who violated its rules of behavior. It was also meant that *Congress* itself could punish a corrupt and venal member — that it could exercise a power that had always been one of the essential factors in the overall struggle

for legislative freedom of debate. (Govt. Br. 21) (italics added).

No authority is cited for this novel reading of the Speech or Debate Clause, much less for the purely speculative conclusion that "the Framers clearly recognized that Congress would have the authority to punish its members for acts of bribery connected with legislative duties." (Govt. Br. 22). We do not suppose that the Framers, distrustful of unicameral legislatures,[33] would have reserved specific authority in "either House" inadvisably in Sections 5 or 6 of the Legislative Article.[34] But assuming that the Framers considered punishment of acts of legislative bribery at all, the conclusion which the Government attempts to establish as the final step in its syllogism is utterly devoid of any foundation in history, logic, or precedent. The fallacy of such conclusion is exposed by its very statement:

> It is equally sound to conclude that the Framers had no objection to, and perhaps even deemed desirable, congressional use of its legislative authority under Article I, Section 1, and the "necessary and proper clause", Article I, Section 8, to enact a statute specifically providing for a trial in the courts of a member who takes a bribe; such a statute avoids the likelihood of a trial influenced by popular clamor and the lack of impartiality necessarily inherent in a legislative body where "all the passions which activate a multitude" may be felt. (Govt. Br. 22).

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[33] *The Federalist* (Nos. 51, 62 and 63 (Hamilton or Madison) (Ford ed. 1898) at 345, 412-413, 419, 423-424.

[34] Section 5 provides that "each House" shall judge the elections, returns and qualifications of its own members; that "each House" may provide penalties to compel the attendance of absent members; that "each House" may authorize the rules of its proceedings, punish members for disorderly behavior, and expel members; that "each House" shall keep a journal of its proceedings; that "neither House" shall adjourn without the consent of the other.

As a matter of historical accuracy, the concept of "a trial in the courts of a member who takes a bribe" would have been completely foreign to the Framers. Such a trial would have been without precedent. Bribery, corruption, and venality are evils as ancient as Parliament itself. Nevertheless, in the entire history of Parliament, there is not one recorded instance in which a member was hailed before a court of law on a charge of bribery in the performance of his legislative duties. Certainly the Government cites no instance and we are unaware of any.[35] Of course, bribe-taking members have been punished severely and committed to the Tower for their misdeeds, but invariably upon the judgment of Parliament itself.[36] Moreover, a charge of bribe-taking by a legislator was not an offense

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[35] The Government cites three Commonwealth cases as holding "that a legislator was amendable to trial and punishment by the courts for taking a bribe in connection with his official duties." (Govt. Br. 15, n.9). Actually, two of the cases involved the prosecution of non-legislators for attempting to bribe members of local parliaments. *Regina v. White*, 13 N.S.W. Sup. Ct. 322 (1875); *Regina v. Bunting*, 7 Ont. Rep. 524 (1885). In the third case, *Rex v. Boston*, 33 Commw. L.R. 386 (1923), a legislator was convicted of accepting bribes, but for non-legislative conduct in inducing the government to purchase certain estates. In *White* and *Boston* the privilege was not considered; in *Bunting* the bribers unsuccessfully attempted to plead the privilege of the legislators. This Court has acknowledged all three cases as "dealing with the general question of liability of legislators for bribery in distinguishable contexts." *United States v. Johnson*, 383 U.S. 169, 180 n.9 (1966). See Note, 78 HARV. L. REV. 1473, 1474 (1965).

[36] For example, in 1677, John Ashburham was expelled for receiving 500 pounds from French merchants for business done in the House. In 1694, a member (Guy) was committed to the Tower of London for taking a bribe of 200 guineas. In the same year, Sir John Trevor was declared guilty of a high crime and misdemeanor in having, while Speaker of the House, accepted a gratuity of 1000 guineas from the City of London after passage of the Orphans Bill; and was expelled. Another member (Hungerford) was expelled for receiving 20 guineas for his service as chairman of the committee on that bill. May, *Treatise on the Law, Privileges, Proceedings, and Usage of Parliament* 114 et seq. (14th ed. Campion 1946).

known to the common law, at least not in 1787 when the Constitution was drafted. Blackstone, perhaps the most respected legal commentator of the period,[37] limited the crime of bribery to occasions "when a judge, or other person concerned in the administration of justice takes any undue reward to influence his behavior in office."[38] Coke likewise regarded bribery as an offense committed by judges.[39] And, contrary to the insinuations of the Government, the Framers and their contemporaries were not so troubled by the spectre of legislative corruption as to make it an indictable offense. When the First Congress met a few years after the Constitutional Convention, the sole expression of their concern with bribery was a statute reserving criminal sanctions for judges who took bribes in exchange for an "opinion, judgment or decree." Act of April 30, 1790, Section 21, 1 Stat. 112, 117. The great awakening of 1853, when Congress is said to have made it a crime for members to accept bribes,[40] occurred years after the death of the last surviving participant in the Convention.

As a matter of logic, it borders on the incredible to assume that the protection which the Framers secured to legislators with one hand they surrendered with the other. After reserving to "either House" the right to "punish its

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[37] "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly the Framers of the Constitution were familiar with it." *Schick v. United States*, 195 U.S. 65, 69 (1904).

[38] 4 Blackstone's Commentaries 139 (5th ed. 1773).

[39] "Bribery is a great misprision, when any man in judicial place takes any fee or pension, robe, or livery, gift, reward or brocage of any person, that hath to do before him in any way, for doing his office, or by color of his office, but of the thing only, unless it be meat and drink, and that of small value." Coke, 3rd Inst. 145 (1797).

[40] Act of February 26, 1853, c. 81, 10 Stat. 170, 171.

Members for disorderly Behavior" in Section 5, the Constitution states an unequivocal prohibition: "for any Speech or Debate in either House they [Members] shall not be questioned in any other Place." These clauses are consistent with one another and were intended to be construed harmoniously.[41] In other words, either House could punish its members but, for any activity covered by the Speech or Debate Clause, they were not to "be questioned in any other Place." Since the Framers saw fit "to prevent intimidation by the executive and accountability before a possibly hostile judiciary,"[42] it can hardly be assumed that the same Framers "had no objection to and perhaps even deemed desirable" a system enabling legislators to be "questioned" in the courts.[43]

It is as a matter of constitutional precedent, however, that the Government's argument is most wanting. Indeed, it is so antagonistic to the fundamental purposes of the Speech or Debate Clause and to the policy declarations of this Court that it is difficult to understand how it can be seriously advanced. What the Government seeks from this Court is a holding that the vote, action, and decision of a Senator may be questioned in a court of law, despite the constitutional prohibition, if Congress permits it by statute. In such a situation, we are informed, "[h]is conduct is subject to censure only if a grand jury returns an indictment charging betrayal of the public trust, and the impartiality of the judicial tribunal protects him from a politically motivated judgment" (Govt. Br. 29).[44]

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[41] *Cohens v. Virginia*, 6 Wheat. 264, 393 (1821).

[42] *United States v. Johnson*, 383 U.S. 169, 181 (1966).

[43] Govt. Br. 22.

[44] This is the identical theme heard in *Johnson*. See text accompanying n.29, *supra*.

It is our firm conviction that the Framers deliberately excluded the grand jury and the judicial tribunal from the legislative arena. We believe that the Clause, as construed by this Court means simply that the conduct of a Senator is "subject to censure" in the Senate and "shall not be questioned in any other Place."

2. Whatever doubt may have at one time existed as to the origins, development and scope of the Speech or Debate Clause has been settled by the repeated decisions of this Court. *Powell v. McCormack*, 395 U.S. 486, 501-506 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967); *United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168, 200-205 (1881). Academic forays into Parliamentary history can add little to the present meaning of the Clause. Having been examined by this Court on five previous occasions, the Clause now bears the indelible gloss of its decisions.

The Speech or Debate Clause is probably the most important guarantee of legislative independence contained in the Constitution. As such, it is a keystone of our tripartite system of government and "serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson*, *supra*, 383 U.S. at 178. "The Speech or Debate Clause, adopted by the Constitutional Convention without debate or opposition, finds its roots in the conflict between Parliament and the Crown culminating in the Glorious Resolution of 1688 and the English Bill of Rights of 1689." *Powell v. McCormack*, *supra*, 395 U.S. at 502. The importance which the Framers attached to its provisions is summarized in *Johnson*:

> This formulation of 1689 was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature. See, e.g., Story, *Commentaries on the Constitution* §866; II *The Works of James Wilson* 37-38 (Andrews ed. 1896).

United States v. Johnson, supra at 178.

The latter sources are enlightening because the authors were distinguished members of this Court during its early days. Justice Story considered legislative freedom a "great and vital privilege * * * without which all other privileges would be comparatively unimportant or ineffectual."[45] In his own evaluation of the Clause, Justice Wilson thought it "indispensably necessary" that every legislator "should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."[46]

The legislative privilege is thus regarded as "one manifestation of the 'practical security' for ensuring the independence of the legislature." *United States v. Johnson, supra*, 383 U.S. at 179. Because of its importance, "the

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[45] Quoted in *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

[46] Quoted in *Powell v. McCormack*, 395 U.S. 486, 503 (1969); *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951). It is noteworthy that Justice Wilson was not only one of the first justices appointed to this Court but also served in the Constitutional Convention as "an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution." *Tenney v. Brandhove, supra.*

legislative privilege will be read broadly to effectuate its purposes * * *." *Id.*, 180. Liberal treatment has been accorded this provision almost from its very inception. In *Kilbourn v. Thompson*, 103 U.S. 168 (1881), this Court adopted the language of an 1808 decision which it regarded as "the most authoritative case in the country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Federal Constitution, is of much weight." *Id.*, 204. The authority so revered is *Coffin v. Coffin*, 4 Mass. 1 (1808), which as the best contemporaneous source on the scope of the Clause, is here quoted at length:

> * * * [T]he article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without enquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber. *Id.* 27.[47]

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[47] The same passage was also quoted in *Tenney v. Brandhove*, 341 U.S. 367, 373-374 (1951). Pertinent to the present case is another statement by Chief Justice Parsons: "If a member * * * be out of the chamber, sitting in committee, executing the commission of the House, it appears to me that such member is within the reason of the article and ought to be considered within the privilege. The body of which he is a member, is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for everything said or done by him in the exercise of his functions as a

These words, spoken within a few years after ratification of the Constitution, hardly reflect the terrified fixation with legislative tyranny which the Government attributes to the Framers. Like Justices Wilson and Story, Chief Justice Parsons of the Supreme Judicial Court of Massachusetts was doubtless aware that Parliament had weathered corrupt practices during the past century. Nor were they or their contemporaries blind to the abuses which had prevailed in England under the *lex parliamenti*, which allowed members, their retinues, their servants, and their goods to enjoy a multitude of immunities from ordinary legal restraints while new "privileges" were created at the will of Parliament.[48] The Framers were careful to abolish all prerogatives of mischief and oppression, while retaining the inherited privilege of speech and debate.[49] This most vital privilege of all "was taken as a matter of course" by the Framers, *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), and "adopted by the Constitutional Convention without debate or opposition." *Powell v. McCormack*, 395 U.S. 486, 502 (1969); *United States v. Johnson*, 383 U.S. 169, 181 (1966).

Thus "it is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess."[50]

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representative in committee, either in debating, in assenting to, or in draughting a report." *Coffin v. Coffin*, 4 Mass. 1, 28 (1808).

[48] For examples, see *Watkins v. United States*, 354 U.S. 178, 188-191 (1957).

[49] "[W]hile the Framers of the Constitution did not adopt the *lex et consuetudo* of the English Parliament as a whole, they did incorporate such parts of it, and with such privileges of Parliament, as they thought proper to be applied to the two Houses of Congress. * * * One of these '[privileges] is 'that the freedom of speech and debates and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.'" *Kilbourn v. Thompson*, 103 U.S. 168, 201-202 (1881).

[50] In a letter cited by the Government Brief at 21, Jefferson wrote in 1789 that "[t]he tyranny of the legislatures is the most formidable

Tenney v. Brandhove, *supra* at 375. It is equally significant, we think, that eminent American jurists wise to the ways of Parliament should have been adament in granting "exemption from prosecution for everything said or done" in a legislative capacity. *Coffin v. Coffin*, *supra* at 27. If "specific obstacles had to be erected against the possible abuse of power by the Congress" (Govt. Br. 21), such obstacles were not to be placed by judges giving a narrow construction to the Speech or Debate Clause.

That all conduct relating to the functioning of Congress comes within the sweep of the Clause has never been doubted by this Court. In *Kilbourn v. Thompson*, 103 U.S. 168 (1881), after quoting the above passage from *Coffin* and declaring its views to be sound, this Court announced the rule which it has observed to this day:

> It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to writ-

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dread at present and will be for long years." This was not Jefferson's last word on the subject, however. When a grand jury at Richmond publicly criticized members of Congress in 1797, Jefferson fired off a petition to the Virginia House of Delegates "that in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive * * *.

"That * * * for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, * * * to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary * * * is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be * * *; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive." 7 *Writings of Thomas Jefferson* 158 (Ford ed. 1898), quoted in Luce, *Legislative Assemblies* 516-518 (1924).

> ten reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, *to things generally done in a session* of the House by one of its members in relation to the business before it. *Id.* 204.[51]

See also *Powell v. McCormack*, 395 U.S. 486, 502 (1969); *Dombrowski v. Eastland*, 287 U.S. 82, 85 (1967); *United States v. Johnson*, 383 U.S. 169, 179 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). In sum, the Clause covers all "acts done within the sphere of legislative activity." *Tenney v. Brandhove, supra.*

Within the coverage of the Clause the jurisdiction of Congress is exclusive. The concise constitutional declaration that "for Speech or Debate in either House they [members] shall not be questioned in any other Place" is clear and unambiguous. It is unqualified in its categorical imperative — "they shall not be questioned in any other Place". It concedes no exception. The Clause proclaims the exclusive competence of the House to inquire into the legislative acts of Representatives and likewise the Senate to inquire into the legislative acts of Senators. They may not be questioned elsewhere.

This blanket prohibition was designed "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Johnson, supra* at 181. It is so conceded (Govt. Br. 20), but with the im-

[51] *Kilbourn* itself applied the Clause to disallow an action against Congressmen based upon their votes in favor of a resolution commanding the arrest of the plaintiff for contempt. Members of legislative bodies are held to be absolutely immune from personal liability for votes cast by them, the underlying motives being irrelevant to the unimpaired enjoyment of such privilege. See, e.g., *Shellburne, Inc. v. New Castle County*, 293 F. Supp. 237, 242-243 (D. Del. 1968), and cases cited.

plied caveat that the executive may intimidate and the courts may demand accountability if Congress enacts "a statute specifically providing for a trial in the courts of a member who takes a bribe" connected with his legislative acts (Govt. Br. 22). We deal elsewhere with this contention but its fallacy appears from the prohibition itself. Legislative power is subordinate to the Constitution and may not override an express Constitutional prohibition. *Marbury v. Madison*, 1 Cranch 137 (1803). And if the Constitution says that members "shall not be questioned in any other Place", then "they need not *answer* in any other place, including courts."[52]

3. The prohibition of the Clause is especially directed against inquiry by the courts. This concern is clearly reflected in tracing the geneology of the Clause.

> The present version of the Clause was formulated by the Convention's Committee on Style, but the original vote of approval was of a slightly different formulation which repeated almost verbatim the language of Article V of the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned *in any court*, or place out of Congress * * *." The language of that Article, of which the present Clause is only a slight modification, is in turn almost identical to the English Bill of Rights of 1689: "That the Freedom of Speech and Debates or Proceedings in Parliament, ought not to be impeached or questioned *in any Court* or Place, out of Parliament." I W. & M., Sess. 2, c. 2.

United States v. Johnson, 383 U.S. 169, 177-178 (1966) (italics added).

Freedom from judicial inquiry "was deemed so essential for representatives of the people that it was written into

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[52] Opinion of Burger, J. (now Chief Justice) in *Powell v. McCormack*, 395 F. 2d 577, 602 (D.C. Cir. 1968), aff'd in part 395 U.S. 486 (1969).

the Articles of Confederation and later into the Constitution." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). So did the States erect definite barriers to all judicial impeachment of legislators. Article VIII of the Maryland Declaration of Rights of 1776 provided that legislative freedom "ought not to be impeached or questioned *in any other court or judicature*" (italics added). Equally specific in denouncing judicial interference was the Massachusetts Bill of Rights of 1780 (Article XXI) and the Constitution of New Hampshire of 1784 (Article XXX). Each declared that the "freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, *in any other Court* or place whatsoever" (italics added).[53] These constitutional prohibitions are indistinguishable in meaning from the federal Clause. As this Court has observed, "the general idea in all of them, however expressed, must have been the same, and must have been in the minds of the members of the Constitutional Convention." *Kilbourn v. Thompson*, 103 U.S. 168, 202-203 (1881). All had their source in the same struggle for legislative independence: all were directed against the same end; to assure that freedom against judicial encroachment. In other words, "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, *supra* at 372.

The consistency with which the judiciary has been constitutionally singled out for exclusion again refutes the curious notion that the Framers, by adopting the Clause, "had no objection to and perhaps even deemed desirable"

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[53] These State constitutional provisions are collected and summarized in *Tenney v. Brandhove*, 341 U.S. 367, 373-375 (1951). See generally Clarke, *Parliamentary Privilege in the American*

the concept of "a trial in the courts of a member who takes a bribe" (Govt. Br. 22). Such a concept was precisely what the Clause sought to eliminate.[54] Upon a charge of bribery, corruption, malice, sedition or criminal libel in the performance of his duties, a legislator was to be questioned by his House and not "in any other place." His official conduct was not to be "questioned" by a jury or "impeached" or "inquired into" or made "the foundation of any accusation or prosecution, action or complaint". The whole object of the Clause, as this Court has recognized, is "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." *Powell v. McCormack*, 395 U.S. 486, 505 (1969). "It *insures* that legislators are free to represent the interests of their constituents *without fear that they will be later called to task in the courts for that representation.*" *Id.* 503 (italics added).[55]

"Legislative immunity does not, of course, bar all judicial review of legislative acts." *Ibid.* It is for the courts, in the first instance, to define the scope of the Clause and then to determine whether the contested activities fall within it. But once the activity is found within that scope, the judicial power under Article III is exhausted and the privi-

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Colonies (1943). On the eve of the Constitutional Convention, the New York legislature passed a Bill of Rights on January 20, 1787, which included a provision that legislative proceedings "shall not be impeached or questioned in any court or place out of the senate or assembly." *Tenney v. Brandhove*, *supra* at 374 n.3.

[54] Indeed, the state and federal constitutional provisions were framed with "great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability." *Tenney v. Brandhove*, *supra* n.53, at 375.

[55] As Judge Youngdahl has said, "reprisal by the executive or judicial branches for what legislators say or do within the legislature must be impossible in order to obtain free discussion and consequent benefits to the public." *McGovern v. Martz*, 182 F. Supp. 343, 346 (D.D.C. 1960).

lege which the Clause confers is absolute. And the courts have had no difficulty in accepting the principle of complete immunity. Although referred to as a "privilege" in *Johnson*, it is also described in terms of "legislative immunity",[56] as "an absolute shield against all outside interference";[57] and as "an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session."[58] The privilege, being absolute, is plain recognition that legislators are and "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

The fact that the same acts, if not privileged, might expose the offending Congressman to trial and civil or criminal liability has never been regarded as a basis for removing the protection of the Clause. This was quickly established in *Kilbourn v. Thompson*, *supra* 103 U.S. at 200-201, when this Court flatly declared that the defendant Congressmen would have been liable for their scheme had

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[56] *Powell v. McCormack*, 395 U.S. 486, 503 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967). See also *Barsky v. United States*, 167 F. 2d 241, 250 (D.C. Cir.), cert. denied 334 U.S. 843 (1948) ("absolute immunity"); *Shellburne, Inc. v. New Castle County*, 293 F. Supp. 237, 242 (D. Del. 1968) ("absolute immunity from liability for his vote").

[57] Yankwich, *The Immunity of Congressional Speech — Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960, 966 (1951). See also *McGovern v. Martz*, 182 F. Supp. 343, 346 (D.D.C. 1960) (Clause seen "as a shield against executive interference with the individual legislator").

[58] *Barr v. Matteo*, 360 U.S. 564, 569 (1959). See also *Cochran v. Couzens*, 42 F. 2d 783 (D.C. Cir.), cert. denied 282 U.S. 874 (1930) ("absolutely privileged"); *Hentoff v. Ichord*, 318 F. Supp. 1173, 1181 (D.D.C. 1970) ("total privilege"); *Lusk v. Hanrahan*, 244 F. Supp. 539, 540 (E.D. Ill. 1965) ("absolute privilege"); *McGovern v. Martz*, 182 F. Supp. 343, 346 (D.D.C. 1960) ("Thus the privilege is absolute: purpose, motive, or the reasonableness of the conduct is irrelevant.")

they not set up the protection of the Clause. It holds true today, as the Government in this very case at bar seeks to strip a Senator of his constitutional immunity by charging that his action, votes and decision on postal rate legislation were bribed.

We submit that Justice Frankfurter, speaking for the Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951), had such a situation in mind:

> The claim of an unworthy purpose does not destroy the privilege. Legislators are *immune* from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. *The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.* The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. * * *
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> * * * In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. *Courts are not the place for such controversies.* Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. *Id.* 377-378 (italics added).

In sum, we can find no basis in any of the prior decisions of this Court to disturb the action of the District Court.

C. CONGRESS CANNOT ENACT A STATUTE DEPRIVING MEMBERS OF THEIR CONSTITUTIONAL IMMUNITY.

1. Since the Speech or Debate Clause plainly excludes all judicial inquiry into matters within its domain, such inquiry cannot be authorized by a narrowly drawn stat-

ute passed by Congress in the exercise of its legislative power to regulate the conduct of its members," *United States v. Johnson*, 383 U.S. 169, 185 (1966), except at the expense of the constitutional prohibition written into the Clause.

The comprehensive power of Congress to enact criminal statutes of general application is not in issue here. There is certainly no contention that the power reserved to the Senate to inquire into the legislative activities of its members or to punish for misbehavior exempts a Senator from the law governing all citizens. A Senator remains liable for criminal conduct in any form, including acts of bribery, "that is in no wise related to the due functioning of the legislative process." *Id.* at 172.[59] This is the essential teaching of *Burton v. United States*, 202 U.S. 344 (1906), on which the Government places great emphasis (Govt. Br. 25). *Burton* involved a Senator convicted of receiving compensation for performing services in a proceeding before the Postmaster General. Legislative immunity under the Speech or Debate Clause, being wholly inapplicable to the situation, was neither invoked by the Senator nor discussed by the Court. It was urged that his conviction would interfere with the Senate's authority over its members and its power to punish and expel, but this Court saw "no necessary connection between the conviction of a Senator of a public offense prescribed by a statute and the authority of the Senate in the particulars named." *Id.* 367. It was plain that the discharge of legislative duties "does not require a Senator to appear before an executive department in order to enforce his particular views, or the

[59] The *Johnson* "decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *Id.* 383 at 185.

views of others, in respect of matters committed to that department for determination." *Id.* 368.

Unlike *Burton*, the discharge of legislative duties covered by the Speech or Debate Clause is directly in question here. *Johnson* holds, of course, "that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause." *United States v. Johnson, supra*, 383 U.S. at 184-185. And thus we return to the same basic question: Whether the power of the Senate to regulate the conduct of its members enables Congress to deprive them of their constitutional immunity by enacting a statute which permits courts to question their motivations, deliberations, votes and decisions upon congressional matters.

In addition to the basic legislative power vested in the Congress,[60] the Senate and the House of Representatives, are each cloaked with separate authority under Section 5 of the Legislative Article to "be the Judge of the Elections, Returns, and Qualifications of its own Members,"[61] and to "determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."[62] These Section 5 powers are plenary and not dependent upon the broad legislative grant contained in Section 1. The power to "judge", to "determine" and to "punish" is vested in each House, and not the Congress at large. See *Kilbourn v. Thompson*, 103 U.S. 168, 183 (1881). The Senate, for example, "is fully empowered and may determine such matters *without the aid of the House of Representatives or the Executive or Judicial Department.*" *Reed v. County Commissioners of Del-*

[60] Article I, Section 1.

[61] Article I, Section 5, Clause 1.

[62] *Id.* Clause 2.

aware County, Pennsylvania, 277 U.S. 376, 388 (1928) (italics added).

In exercising its Section 5 power to "punish its Members for disorderly Behavior", can the Senate enlist the aid of the House or the executive or the judiciary? Although the Senate may certainly join with the House to enact implementing legislation, such as might be necessary to secure the attendance of witnesses, it is extremely doubtful whether the crucial determination itself may be delegated by statute to the judiciary. This Court has seldom had occasion to examine the disciplinary power under Section 5. See *Powell v. McCormack*, 395 U.S. 486 (1969); *McGrain v. Daugherty*, 273 U.S. 135, 172 (1927); *Marshall v. Gordon*, 243 U.S. 521, 536 (1917); *In re Chapman*, 166 U.S. 661, 668-670 (1897); *Kilbourn v. Thompson*, 103 U.S. 168, 182, 189-190 (1881); *Anderson v. Dunn*, 6 Wheat. 204, 232-233 (1821). Not one of these decisions lends encouragement for the proposition, advanced here, that the punishment of Congressmen and their expulsion are matters for the courts to adjudicate in the first instance.[63] Wholly

[63] *Powell v. McCormack*, 395 U.S. 486 (1969), is certainly not a decision to the contrary: The holding was premised upon a determination that the House of Representatives, by its own deliberations and vote, had excluded,— not expelled — Congressman Powell. This Court declined to "speculate what the result would have been if Powell had been seated and expulsion proceedings subsequently instituted." *Id.* 508. Moreover, no view was expressed on what limitations may exist on Congress' power to expel *or otherwise punish a member* once he has been seated." *Id.* 507 n.27 (italics added). In *Powell*, the Court held that the Constitution does not give the House of Representatives judicially unreviewable power to set qualifications of membership but that its adjudicative function is limited to judging whether prospective members meet those qualifications enumerated in the Constitution. *Id.* 520, 547-548. Consistent with this interpretation, federal courts might still be barred from reviewing the House's factual determination that a member did not meet one of the standing qualifications. It was implicit throughout the opinion that the powers conferred by Section 5 are beyond judicial cognizance except where their exercise violates other constitutional inhibitions; in all other respects the House is "sole judge". See *id.* 552 (Douglas, J., concurring).

apart from the constitutional objections arising under the Speech or Debate Clause, the strong tradition of legislative self-discipline before and after 1787 argues against any implied power of delegation.[64] It is unthinkable that those who drafted the Constitution, after centuries of struggle for legislative independence, would have confided specific but separate grants to the Senate and to the House with the expectation that the actual power would devolve instead upon the judiciary.[65]

The conclusion is inescapable that the Constitution vests the power to punish or expel in each House with the plain implication that it will be exercised there, not in a courtroom pursuant to a joint Act of Congress. Indeed, the Constitution does not entrust Congress with a general supervisory power over its two components. *Kilbourn v. Thompson*, 103 U.S. 168, 183 (1881).

> That instrument, however, is not wholly silent as to the authority of the *separate* branches of Congress to inflict punishment. It authorizes *each* House to punish its *own* members. *Ibid* (Italics added).

In its first encounter with that Section 5 provision, this Court recognized "that the exercise of the powers given over their own members was of such a delicate nature that a constitutional provision became necessary to assert or communicate it." *Anderson v. Dunn*, 6 Wheat. 204, 233 (1821).[66] Matters of such "delicate nature" contemplate that each branch of Congress will exercise its own inde-

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[64] See episodes summarized in Govt. Br. 13-19.

[65] As this Court has said: "Courts are not the places for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

[66] Certainly the Constitution did not intend that the judicial branch exercise a power which the Constitutional Convention expressly refused to vest in the whole Congress.

pendent judgment by imposing punishment on a case-by-case basis, rather than by formulation of a rule of law to be applied to its members in a judicial tribunal. In the case of Senators, the power to punish or expel thus "extends to all cases where the offense is such *as in the judgment of the Senate* is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U.S. 661, 669-670 (1897) (Italics added). Over the years members have been censured, fined, and expelled[67] on a variety of grounds,[68] but the discretion to proceed against a Senator under Section 5 has always remained exclusively in the hands of the Senate.

In short, we submit that the Senate has a non-delegable constitutional obligation to decide for itself whether its members will be subjected to punishment or expulsion. Neither the Senate nor the Congress may constitutionally legislate away this vital function, by a narrowly drawn

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[67] Imprisonment may be imposed by the Senate in appropriate cases. *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881).

[68] Including the acceptance of bribes and emoluments. See II Hinds', *Precedents of the House of Representatives* §1236 et seq. (1907). In 1873, for example, a House investigated the fact that Congressman Oakes Ames had distributed a quantity of stock among influential members as a precaution against congressional inquiry into the affairs of Credit Mobilier, a railroad holding company. As a leading historian has said, the stock "was, in truth, intended as a bribe. It *was* a bribe." Bowers, *The Tragic Era: The Revolution After Lincoln* 396 (Houghton-Mifflin ed. 1962). The scandal touched the Vice-President, Vice-President-elect, the Chairmen of the most important committees of the House, and the floor leader of the minority party in the House. The shocking disclosures linked nine members of Congress to the scheme. The House ultimately censured Congressmen Ames and Brooks, after expulsion attempts failed. *Id.* 396-404. See II Hinds, *supra* at §1286. There is no record of any indictments growing out of this sordid episode. This Court once reviewed a Senate investigation into charges that Senators had been speculating in sugar stocks during the consideration of a tariff bill pending before them. *In re Chapman*, 166 U.S. 661, 663 (1897). The charges were held to be "within the jurisdiction of the Senate" under Section 5. *Id.* 669.

statute or otherwise.[69] These conclusions are strengthened by the realization that Section 5 powers, in a very real sense, "are not legislative, but judicial in character." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929). In exercising such powers, "the Senate acts as a judicial tribunal" and its power to adjudge "is in no wise inferior under like circumstances to that exercised by a court of justice." *Id*, 616. For example, while acting within the constitutional limits assigned to it, the Senate passes upon contested elections to that body, exclusive of any tribunal, including the courts.[70] In determining the rules of

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[69] One writer, addressing himself to the "narrowly drawn statute" question posed in *United States v. Johnson*, 383 U.S. 169, 185 (1966), has concluded that "the clear and irrefutable logic of [the *Johnson*] decision leads to the inescapable conclusion that Congress must in some way deal with these problems [of legislative wrongdoing] itself and cannot delegate away its exclusive jurisdiction to regulate the legislative conduct of its members." Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U.L. REV. 1, 41 (1968). "If the legislature is held to be the exclusive forum for the trial and punishment for legislative misconduct and misbehavior, then serious questions exist as to the ability of the legislature to delegate to others its power to try and punish its own members, regardless of how precisely it may endeavor to define the specific nature of the offense. Privilege, moreover, as we have seen, inheres in the individual legislator and not in the collective body. It cannot, therefore, be delegated away." *Id*. 41-42.

[70] *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929). See also *Jones v. Montague*, 194 U.S. 147, 153 (1904) ("sole judge"); *Sevilla v. Elizalde*, 112 F. 2d 29, 32, 37 (D.C. Cir. 1940); *Rogers v. Barnes*, 474 P. 2d 610 (Colo. 1970); *Laxalt v. Cannon*, 80 Nev. 388, 397 P. 2d 466 (1964); *Odegard v. Olson*, 264 Minn. 439, 119 N.W. 2d 717 (1963); *Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W. 2d 504 (1946). "The many volumes of election contest cases in which every conceivable question has been raised with reference to the right of persons to sit as members of Congress, together with the fact that there are no court decisions to be found controlling such matters, bear mute but forcible evidence that this court has no authority to be the judge of the manner in which such members were elected * * *." *Keogh v. Horner*, 8 F. Supp. 933, 935 (S.D. Ill. 1934).

proceedings; in accordance with the same clause of the Constitution which authorizes punishment and expulsion, the Senate may not ignore constitutional restraints but, subject only to these limits, its power under that clause is "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

Within this non-delegable category falls the power to punish or expel. That power was specifically identified by this Court when it said "that the powers confided by the Constitution to one of these departments cannot be exercised by another." *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881). In this separation of powers context, the authority to discipline members confided in the Senate may not be exercised elsewhere. The power unquestionably entails the informed judgment of the Senate as a precondition to its exercise. Cf., *In re Chapman*, 166 U.S. 661, 669-670 (1897). As is the case of the other Section 5 powers, the exercise by the Senate of its power to punish "necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally to render a judgment which is beyond the authority of any other tribunal to review." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929).[71]

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[71] We do not overlook the fact that this quotation from *Barry* is regarded as dictum. *Powell v. McCormick*, 395 U.S. 486, 519 n.40 (1969). This Court indicated that the language in *Barry* must be qualified in one important respect but did not otherwise question its authority. *Barry*, as modified by *Powell*, means simply that only the Senate can initiate disciplinary action against a member but that such action is not automatically immune from judicial review to determine its constitutionality. Indeed, as the Court recognized in *Powell*, *supra* at n.40, *Barry* itself conditioned the exercise of Senate power "to the restraints imposed by or found in the implications of the

2. Our conclusions with respect to the Senate's power under Section 5 are derived without reference to the prohibition against outside inquiry contained in the Speech or Debate Clause. If our interpretation of Section 5 is correct, then there is no unnecessary conflict with Section 6. The regulation of the conduct of Senators, as well as expulsion, may be regarded as functions vested in the Senate to the exclusion of the judiciary. Under this harmonious construction, and consistent with the separation of powers doctrine, Senators may be punished by the Senate for misconduct in the performance of their legislative duties but "they shall not be questioned in any other Place."

This analysis is supported by a recent study completed by the Association of the Bar of the City of New York. Referring to *United States v. Johnson*, 383 U.S. 169 (1966), the report indicates the proper relationship between disciplinary power and legislative privilege:

> The judicial rulings in the *Johnson* case point up the importance of Congress' using its own disciplinary powers. Such matters as a bribe-induced speech or vote are insulated from criminal prosecution as a part of a Constitutional scheme to protect the independence of the Legislative Branch. As a corollary, it was empowered and expected to keep its houses clean by using its powers to expel and punish for misbehavior.[72]

Constitution." *Id.* 279 U.S. at 614. This thoroughly reinforces our own view that the power to regulate the conduct of Senators, *United States v. Johnson*, 383 U.S. 169, 185 (1966), which is not truly a legislative power of Congress, is subject to the restraints imposed by the Speech or Debate Clause as to the questioning of members outside the Senate.

[72] Kirby, *Congress and the Public Trust* 23 (1970). The same interrelationship has been identified in earlier commentaries. See Bishop, *Commentaries on the Non-Contract Law* §§775-778, at 360-361 (1st ed. 1889).

3. Members of either House cannot be "questioned in any other Place" within the meaning of the Speech or Debate Clause. It is implicit that the Senate can question a member in respect of his legislative conduct, just as it is explicit under Section 5 that it is empowered to punish or expel him. To question a Senator is to perform an adjudicative function which Section 6 of the Legislative Article vests in the Senate to the exclusion of the judiciary. As our previous discussion makes clear these conclusions seem unchallengable.

The Government insists that the unfettered power to punish members for misbehavior, including the acceptance of a bribe in exchange for legislative conduct, is vested in Congress (Govt. Br. 23-24). On this assumption the Government argues that Congress can exercise such power by enacting "a narrowly drawn statute" empowering the regular judicial tribunals to inquire into such behavior. In this fashion, the barriers erected in *United States v. Johnson*, 383 U.S. 169 (1966), would be lowered and legislative conduct would be opened to executive and judicial scrutiny.

Conceding the full extent of this assumed power of Congress, the argument is so afflicted by a fatal defect that we need not further examine its premises. The complete answer is that it is the Constitution, not the Congress, which is the source of the legislative privilege. As this Court said most recently in *Powell v. McCormack*, 395 U.S. 486 (1969):

> Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task for that representation. *Id.* 503.

That insurance, which protects the electorate as the primary beneficiary, cannot be withdrawn by Congress. Con-

duct within the coverage of the Clause remains immune. As the Government is so fond of saying,[73] Congress is not endowed with the *lex parliamenti* of England. *Watkins v. United States*, 354 U.S. 178, 192 (1957); *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1881); *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821). Without such omnipotence Congress is in no position to expand, contract or otherwise vary the limits of the privilege vested in its members. *Watkins v. United States, supra* at 188; *Tenney v. Brandhove*, 341 U.S. 367, 376-377 (1951). Just as Congress may not acquire power by an unwarranted extension of privilege or by creating new ones, neither may it abolish or abridge a privilege secured to its members by the Constitution.[74]

We again refer to *Coffin v. Coffin*, 4 Mass. 1 (1808), which this Court has acknowledged as the first and "perhaps the most authoritative case in this country" on the Speech or Debate Clause.[75] *Coffin* speaks persuasively on the question of whether a legislative body can constitutionally alter the scope of the Clause. In that case, a question arose as to whether the Clause should be interpreted in the light of a limiting resolution passed by the Massachusetts legis-

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[73] Govt. Br. 15-16, 22 n.22, 26. See also Brief of United States, at 24 n.21, 34-36, *United States v. Johnson*, 383 U.S. 169 (1966).

[74] One of the most disgraceful aspects of the John Wilkes affair, discussed in the Govt's. Brief (at 16-17, 19-20), was the exercise by the royally-controlled House of Commons of the *lex parliamenti* to deprive Wilkes of his legislative privilege and thereby assure his conviction by the King's Bench for seditious libel. See *Powell v. McCormack*, 395 U.S. 486, 527-531 (1969). As a leading historian has written, Commons "withdrew the shield of privilege in order to justify a judicial decision contrary to law and usage, and then, not content with expelling the obnoxious member, proceeded illegally to deprive the electors of Middlesex of their free choice of a representative." Taswell-Langmead, *English Constitutional History* 652 (10th ed. 1946).

[75] *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). The construction placed upon the Constitution by judges who were contemporary with its formation is not merely entitled to very great

lature.[76] Responding for a unanimous Court, Chief Justice Parsons said:

> In considering this article [of the Constitution], it appears to me that the privilege secured by it is not so much the privilege of the House as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the House. For he does not hold this privilege at the pleasure of the House; but derives it from the will of the people, expressed in the Constitution, which is paramount to the will of either or both branches of the legislature. * * * Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature. *Id.* 27.[76]

Since the constitutional protection afforded by the Speech or Debate Clause is intended to secure to the people the right to representation free from judicial or executive interference, it is clear that Congress cannot waive this prohibition by an enactment subjecting its members to prohibited questioning any more than Congress can alter any other part of the Constitution by legislation. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Congress cannot empower courts by statute to question the legislators any more than it can empower courts to attain other forbidden ends. For example, the Constitution says: "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on confession in open C[illegible]

> Here the language of the constitution is addressed especially to the courts. It prescribes directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one

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weight; "it is almost conclusive." *Fairbank v. United States*, 181 U.S. 283, 309 (1901); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

[76] See n.69, *supra*.

[77] Consttiution, Article III, §3, Clause 1.

witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act? *Id*, 179.

It is similarly inconceivable to us that legislative immunity can be subordinated to a well-intentioned Act of Congress abolishing legislative immunity in certain instances while retaining it in others. An executive charge of venality would thus become the touchstone of judicial accountability. However "narrowly drawn" the encroachment, it would necessarily erode the principle that Congressmen should not be "distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." *Powell v. McCormack*, 395 U.S. 486, 505 (1969). Under such a statute the privilege secured by the Clause would be contingent upon a grand jury's evaluation of unworthy purpose or corrupt motives — precisely what this Court has declared to be constitutionally impermissible. "The privilege would be of little value if [Congressmen] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculations as to motives." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

When constitutional power impinges upon some basic value secured by another provision of the Constitution, such power must yield. As this Court said recently in *Williams v. Rhodes*, 393 U.S. 23 (1968):

> * * * [T]hese granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. For example, Congress is granted broad power to "Lay and collect Taxes", but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination. *Id*, 29.

Nor can Congress constitutionally warrant a judicial inquiry into matters of conscience privileged under the Speech or Debate Clause, any more than it can take away or replace any other constitutional privilege. Giving full play to the powers conferred by Section 5 to discipline Members, this Court would be "no less obliged to heed the limitations placed upon those powers by the Constitution's other commands." *Haynes v. United States*, 390 U.S. 85, 98 (1968). See *Apthekes v. Secretary of State*, 378 U.S. 500, 509 (1964).

We do not suppose that a Senator could be punished or expelled by his colleagues for unburdening himself of an impassioned harrangue on an unpopular cause, much less placed on trial in a court of law under a delegation of such assumed power. Cf., *Bond v. Floyd*, 385 U.S. 116 (1966).[78] "Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office, also so they may be represented in governmental debates by the person they have elected to represent them." *Id*, 136-137. In formulating their positions and in voting on matters pending before them, legislators cannot be deprived by Act of Congress of that "Freedom of speech and action in the legislature * * * deemed so essential for representatives of the people that it was written into * * * the Constitution." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

To deny to Congress the authority to legislate away the privilege of its members is not to disparage its comprehensive legislative powers under Sections 1 and 8 or the powers

[78] See *Powell v. McCormack*, 395 U.S. 486, 522 (1969) (Douglas, J., concurring). "Members of Congress have the same right to speak as anyone else." *Hentoff v. Ichord*, 318 F. Supp. 1175, 1179 (D.D.C. 1970).

reserved to its coordinate branches under Section 5. If any doubt remains on the subject, one need look no further than *Powell v. McCormack*, 395 U.S. 486 (1969), which so recently held that the plenary authority to judge the qualifications of members does not permit legislative action to exclude any person, duly elected by his constituents, who meets all the qualifications prescribed in the Constitution. *Id*, 522. For Congress to prescribe additional qualifications by statute would constitute a usurpation of power. Likewise, the other exclusive and adjudicative powers vested in the House and the Senate by Section 5 are qualified by other constitutional provisions in general and by the prohibition of the Speech or Debate Clause in particular. Thus the Senate may judge the elections and "render a judgment which is beyond the authority of any other tribunal to review" under Section 5, "subject only to the restraints imposed by or found in the implications of the Constitution." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613, 614 (1929). Similarly, each House may determine its rules of proceedings, and its power in this respect is "absolute and beyond the challenge of any other body or tribunal"; yet it "may not by its rules ignore constitutional restraints or violate fundamental rights." *United States v. Ballin*, 144 U.S. 1, 5 (1892). We perceive no reason why the assumed power to regulate the conduct of Senators should not be limited by the same instrument from which such power is derived.

4. On a more fundamental plane, the Government's position is impaled on the separation of powers doctrine. *Johnson* establishes that the Speech or Debate Clause, apart from preserving the legislative privilege, "serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 178 (1966). Moreover, "the in-

stigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause." *Id.* 182. The importance of the Clause in the tripartite system of Government can scarcely be minimized. "The Clause is the only constitutional provision wherein the doctrine of separation of powers is explicit and its history indicates that any matter concerning either House of Congress should be examined and adjudged in the House to which it relates, and not elsewhere." *Stamler v. Willis*, 287 F. Supp. 734, 738 (N.D. Ill. 1968), rev'd on other grounds 415 F. 2d 1365 (7th Cir. 1969).

The express constitutional prohibition against outside questioning of Congressmen is an explicit exception to the general grant of judicial power to the courts in Article III of the Constitution.[79] This denial to the judiciary of a function which is essentially adjudicative is by no means unique to the Speech or Debate Clause. In addition to the Section 5 powers discussed *supra*, the Senate "shall have the sole Power to try all impeachments."[80] We doubt that the Senate, in the exercise of its sole power, could combine with the House of Representatives, which has "the sole Power of Impeachment",[81] to pass a statute delegating such power to the courts.[82] It is also beyond the com-

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[79] Supportive of this conclusion are, e.g., Scharpf, *Judicial Review and the Political Question — A Functional Analysis*, 75 YALE L.J. 518, 540 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959). Compare *Powell v. McCormack*, 395 U.S. 486, 513-514 (1969).

[80] Constitution, Article I, §3, Clause 6. See *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881).

[81] Constitution, Article I, §2, Clause 5.

[82] Cf., *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 136-137, 140-141 (1970) (Douglas, J., concurring). See n.84, *infra*.

petence of Congress to enable courts to give advisory opinions, e.g. *Muskrat v. United States*, 219 U.S. 346 (1910), or to decide moot cases, *United States v. Evans*, 213 U.S. 297 (1909).

By the same token, power which the Constitution denies to the judiciary cannot be conferred upon it by Congress. It is not merely a question of the extent of the power vested under the Speech or Debate Clause. That power, whatever its limits, cannot be delegated to the courts because "they are incapable of receiving it." *American Insurance Company v. Canter*, 1 Pet. 511, 546 (1828). It is a fundamental limitation, implicit in the division of powers, "that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency." *Williams v. United States*, 289 U.S. 553, 580 (1933) (court's italics). See *United States v. Brown*, 381 U.S. 437, 443 (1965); *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881).

5. The Government argues here, exactly as it did five years ago in *Johnson*,[83] that "[s]ound considerations of policy support the authority of Congress to provide for judicial trials of corrupt members" (Govt. Br. 26-27). It is said that "legislative machinery is not geared to resolve the sensitive issues of guilt or innocence"; that the punishment is too light; that a trial by the Senate "is apt to be influenced by political factors extraneous to considerations of justice", and that "politically independent judges and juries" are more suited to the task of ruling upon "blameworthiness" (Govt. Br. 27-28). The Speech or Debate Clause is vindicated by judicial proceedings, concludes the Government because:

[83] See n.29, *supra*, and accompanying text.

> His conduct is subject to censure only *if a grand jury returns an indictment* charging betrayal of the public trust, and the impartiality of the *judicial tribunal* protects him from a politically motivated judgment. Concomitantly, the use of the *judicial process* promotes public confidence in the integrity of Congress since such a procedure evinces a deliberate legislative decision to try one of its own in a nonpolitical forum *over which it has no control* (Govt. Br. 29) (italics added).

These arguments do not improve with age. Indeed, they come 184 years too late.[84] These remonstrations in opposition to the Speech or Debate Clause, and the history and principles of legislative independence on which it is based, were not heard in 1787, were rejected in 1966, and should not be reconsidered now. The adoption of the Clause "as a matter of course by those who severed the Colonies from the Crown and founded our Nation"[85] "with-

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[84] Against such objections the Constitutional Convention designated the Senate as the appropriate forum for the trial of impeachments. *The Federalist*, Nos. 65, 66 and 81 (Hamilton) (Ford ed. 1898), at 433-446, 542-543. To the detractors of legislative trials, who championed a "nonpolitical" judicial court of impeachments, Hamilton gave this reply (*id*, No. 65, at 435):

"The Convention, it appears, thought the Senate the most fit depository of this important trust. Those who can best discern the intrinsic difficulty of the thing will be least hasty in condemning that opinion, and will be most inclined to allow due weight to the arguments which may be supposed to have produced it.

"What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? * * *

"Where else than in the Senate could have been found a tribunal sufficiently dignified or sufficiently independent? What other body would be likely to feel *confidence enough in its own situation* to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused and the *representatives of the people, his accusers?*" (Italics in original.)

[85] *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

out discussion and without opposition,"[86] stands as a lasting refutation of any judicial competence in the arena served by the Clause. It is inconceivable that the Constitution, with its definite assurance that members of either House "shall not be questioned in any other Place," would also suffer Congress to turn members over to "a nonpolitical forum over which it has no control." In evaluating the imaginative guilt-fixing scheme concocted by the Government, how ironic it seems that the Senate is given no voice at all in proceedings against one of its members!

This assuredly was not the plan created by the architects of our Constitution. Legislative immunity (with its corollary prohibition against judicial inquiry) was adopted to reinforce "the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 178 (1966).

> This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny.[87]

If smooth-functioning judicial machinery was excluded from the realm of the Clause, it was with the realization that legislators are called upon to deliberate and make political decisions which invite suspicions and allegations of improper motive. It is their responsibility, as elected representatives of the people, to be influenced at every turn. Owing loyalty to constituents of varying persuasions, and obliged to satisfy their needs and to serve their special interests, they hold themselves open to all manner of suggestions, methods, and techniques. They are approachable and they are approached, often in secrecy and under circumstances ambiguous enough to excite the sus-

[86] *United States v. Johnson*, 383 U.S. 169, 177 (1966).
[87] *United States v. Brown*, 381 U.S. 437, 441 (1965).

picions of a grand jury, perhaps instigated by an unfriendly Government attorney developing "inferences" from facts susceptible of different meanings.

Political conduct calls for political judgments.[88] It is manifest that the Framers deliberately eschewed inquisitions in the courtroom in favor of unlimited freedom of speech and action by Congressmen as the most effective assurance of an electorate served by independent lawmakers. To that end the Speech or Debate Clause embodies the public policy of our Nation and should be liberally construed. *Cochran v. Couzens*, 42 F. 2d 783, 784 (D.C. Cir.), cert. denied 282 U.S. 874 (1930). We believe with Justice Frankfurter, that:

> In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.[89]

6. To the extent that a provision of the Constitution requires justification at all as a precondition to its liberal application, we submit that "sound considerations of policy" point away from the Government's position. Unlike *all* officers of the executive and judicial branch, with the lone exceptions of the President and Vice President, members of Congress are elected to office. They must of

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[88] *Barsky v. United States*, 167 F. 2d 241, 250 (D.C. Cir.), cert. denied 334 U.S. 843 (1948). It has been said "that the political nature of the privilege calls for a politically determined penalty." Note, 78 HARV. L. REV. 1473, 1474 (1965).

[89] *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). As Chief Judge Sobeloff observed in the *Johnson* case, it was the House and the Senate which "the Founders thought could be trusted to deal fairly with an accused member and at the same time do so with proper regard for their own integrity and dignity." *United States v. Johnson*, 337 F. 2d 180, 190 (4th Cir. 1964), aff'd 383 U.S. 169 (1966).

necessity rely heavily upon gifts in the form of political campaign contributions to finance the constantly rising costs of political campaigns requiring access to the various forms of mass communications media. This, as well as an awareness that a Senator may be swept out of office at any election, has made it mandatory for them to trade votes, compromise, defend special interests, and look after their constituents.[90]

The acceptance of a gift or a political campaign contribution by a member of Congress is not inherently unethical or dishonest even if it bears some relationship to

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[90] "In fundamental respects, however, the congressional problem differs from that of the executive. It is too easy to say glibly that rules governing the administrator should govern the legislator. The Congressman's representative status lies at the heart of the matter. As a representative, he is often supposed to represent a particular economic group, and in many instances his own economic self-interest is closely tied to that group. That is precisely why it selected him. It is common to talk of the Farm Bloc, or the Silver Senators. We would think odd a fishing state Congressman who was not mindful of the interests of the fishing industry — though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would prevent the farmer Senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflicts of interest in Congress runs afoul of the basic premises of American representative government.

"Furthermore, no member of Congress can subsist on his government salary. Forced to keep his base and to spend time in his home district, he unavoidably incurs heavy and regular travel expenses. Campaign costs soar as campaign techniques turn to mass communication media. And the Congressman must always be prepared to sail on the next ebb of the political tide. These facts, taken together with the myth that membership in Congress is still a part-time job, ensure that Congressmen will keep up their outside economic connections, and that they will insist upon the necessity and justice of their doing so." The Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 13-16 (1960). See Note, 78 HARV. L. REV. 1475-1476 (1965).

an official act such as his vote. Positions taken with the hope and even the immediate prospect of campaign contributions must be countless. Who in the United States Senate has not been influenced in the performance of his legislative acts by outside persons, organizations, or interests? Undoubtedly there have been innumerable instances of Senators and Representatives who have espoused causes and received some related compensation in an infinite variety of forms, i.e., presidential patronage, promises of political support and political contributions.[91]

These facts of political life suggest that a power in the hands of the executive to indict a Senator on the ground that a political campaign contribution or a political commitment of value was the true motivation for a vote in the Senate would be a very great power indeed. To give the executive branch this weapon it seeks to wield would

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[91] These considerations are ably expressed by a dissenting judge in *Regina v. Bunting*, 7 Ont. Rep. 524 (1885), involving a conspiracy to bribe members of the provincial parliament. The defendants, none of whom were members, attempted to raise the privilege but the majority refused to extend it to them. The dissenting judge would have dismissed the indictment even on motion by non-legislators:

"[T]he 'log rolling' at the various legislatures of the United States, and the 'lobbying' at our own legislatures, afford instances numerous and various of the means by which members have been induced to vote as they would not have voted, had they not been influenced by special means of a personal, and not seldom of a selfish character.

"That it has been so in the past, and is likely to be so frequently in the future, is to be deplored as an evil; but I fear it is one of the evil results of the imperfection of human nature for which there is no absolute remedy within man's power. The Constitution requires, very properly, the very nature of parliamentary business requires, that the communication between members of Parliament and their constituents should be free from restraint of any kind, and quite unrestricted by arbitrary rules. The intercourse between the public at large, as well as his constituents, and him, is also free, and he is liable to be influenced more or less in his conduct by their opinions and expressed wishes in all public and in many private matters. Thus he is constantly in contact with parties outside of Parliament, and in the way of being influenced by them in various ways, and by ways and devices not always patent, but seductive, and sometimes, when

create a substantial obstacle to the exercise of independent judgment and courage by a legislator. If the executive branch is given such a power of intimidation, it would gain a club to hold over the head of each member of Congress who gives favorable consideration to any measure whose proponents have contributed to his campaign.

If such charges as here involved[92] can be leveled at a member of the Congress, then the investigative apparatus of the executive can proceed to inquire into the motivation of any Senator. Agents of the Federal Bureau of Investigation may intrude themselves into the halls of the Congress and the Senate Office Building, interview staff personnel, contributors to Congressional campaigns, and others — all for the purpose of ferreting out whether con-

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properly regarded, corrupt. The promise of office is not infrequently used as a baited hook with effect. Dinners, wine, and jovial intercourse open the way to confidence with the usual results of undue and frequently corrupt influence. The direct offer of money is probably seldom resorted to in such cases, and it may probably be not unfairly presumed that it never is resorted to unless it be known or shrewdly suspected that the member is liable to temptation of that kind. But, however, this may be, the practice of bribery is many-sided, and bribery is effected or attempted in various ways. * * *

"It is undoubtedly an offense to bribe or attempt to bribe a public officer to do amiss, or leave undone anything in the discharge of his duty. But a member of Parliament is not a public officer. He is a legislator — is a representative immediately of a certain body of people limited to a certain portion of territory within the realm, and indirectly of the realm. His duties are neither executive, nor administrative, but deliberative. His mission is to discuss, deliberate, and legislate. To do this properly his intercourse with his constituents and the public, in the most extensive sense of the terms, must be free and unrestrained. He is therefore necessarily the sole judge of what he may hear and entertain, and how he may be persuaded, subject only to such limits and regulations as are imposed by the law and the usage of Parliament for the preservation of the honor of the member, and the dignity of Parliament; and herein the Courts are not permitted to interfere." *Id.* at 564-65, 568-69.

[92] The present indictment charges the appellee with receiving funds from a lobbyist for himself and for an entity described as the "D.C. Committee for Maryland Education" (A. 1-5).

templated action by a Senator is being made, or influenced, by improper or unethical or dishonest motives. Such an investigation, without more, should be deemed an intolerable affront to the privilege secured by the Speech or Debate Clause.

As this Court said in its latest encounter with the Clause, legislative immunity "insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." *Powell v. McCormack*, 395 U.S. 486, 503 (1969). Fear of a charge by indictment and subsequent trial, with the prospects of ultimate vindication perhaps years away, may be itself so devastating as to produce an evil far worse than bribery. With the power of the grand jury at its disposal, the executive could itself influence and indeed control the votes of a suspected member on issues critical to the administration. Surrender of legislative independence would thus become the *quid pro quo* for legislative immunity, as was the case in eighteenth-century England when it was the Crown that did the bribing. This must not happen here by loosening the fabric of the Speech or Debate Clause.

D. THE FEDERAL BRIBERY STATUTE, 18 U.S.C. §201, IS NOT A NARROWLY DRAWN STATUTE.

We turn now to the issue which the Government urges upon this Court, i.e., whether the federal bribery statute, 18 U.S.C. 201, meets the constitutional standard suggested in *United States v. Johnson*, 383 U.S. 169, 185 (1966), of "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." (Govt. Br. 29). The question was left open in *Johnson* "for consideration when the case arises," and, as we have explained, we do not regard this as the proper

case. We have also dealt at length with the supposed power of Congress "to regulate the conduct of its members" by statute and have concluded that such power is wanting as against a claim of privilege under the Speech or Debate Clause.

Putting these considerations to one side, it remains to be seen whether §201, is a "narrowly drawn statute" within the contemplation of *Johnson*. Although *Johnson* did not define what is meant by a "narrowly drawn statute", this Court has employed the term repeatedly in a First Amendment context, including twice during the term *Johnson* was decided. See, e.g., *Ashton v. Kentucky*, 384 U.S. 195, 201 (1966); *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966). See also *Whitehill v. Elkins*, 389 U.S. 54, 62 (1967); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940). The First Amendment analogy is somewhat imperfect, in view of the differing background and aims of the Speech or Debate Clause, but the formulation in *Whitehill* may well serve as a rough definition of what is *not* "narrowly drawn":

> The lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find an overbreath that makes possible oppressive or capricious application as regimes change. *Id.* 389 U.S. at 61-62.

Moreover, in a First Amendment context, this Court has indicated that overbreadth is measured by the whole range of possibilities, not merely by what has happened in the individual case before it. *United States v. Robel*, 389 U.S. 258, 265-266 (1967). This was emphasized in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), in language which has present relevance:

> * * * [I]n appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesi-

> tated to take into account possible applications of the statute in other factual contexts besides that at bar. * * * The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. * * * These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. * * * [G]overnment may regulate in the area only with narrow specificity. *Id.* at 432-433.[93]

The unmistakable connotation is thus one of precision in defining the conduct to be regulated. In the analysis of overbreadth it is of scant importance that Congress, in enacting 18 U.S.C. §201, chose to include its members by express mention rather than by implication. For the purpose of §201:

> "public official" means Member of Congress, or Resident Commissioner either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of such department, agency, or branch of Government, or a Juror * * *. 18 U.S.C. §201(a).

That Congress chose to include members within the broad sweep of §201 is singularly unimpressive, in view of its

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[93] The Government argues that §201 is not void for vagueness under due process standards but concedes that if the statutory provisions are overbroad in a First Amendment sense "then we can conceive of no statute directed at punishing a member of Congress for taking a bribe that would be constitutionally valid" (Govt. Br. 31).

concurrent intention to also extend coverage to millions of government officers and employees, from the President on down, plus all private citizens who serve on federal juries or have had occasion to act "for or on behalf" of the United States.[94] The identification of Congressmen in a criminal statute as "public officials", along with the rest of the general population, hardly establishes §201 as a "narrowly drawn statute", although the Government argues to the contrary (Govt. Br. 29-30).

Nor does it necessarily follow that Congress intended by definitional inclusion that its members be subjected to prosecution under each of the 11 paragraphs of §201, especially in the teeth of a claim under the Speech or Debate Clause. The "public official" definition makes sense in several areas where no questions arise under the Clause. For example, subsection (b) makes it a federal crime to bribe a "public official". Subsection (f) is to like effect. Read in the context of these provisions, it would not be objectionable for a Congressman to be classified as a "public official" because his legislative immunity would not shield the bribe-giver.

It is only when an attempt is made to read the definition of subsection (a) into the substantive provisions of subsections (c) or (g) that grave constitutional problems are encountered. The indictment against appellee is such an attempt, for which there is absolutely no precedent. It is founded upon the supposition that members of Congress are "public officials" within the intendment of subsections (c)(1) and (g). This construction depends upon an indis-

[94] See, e.g., *Parks v. United States*, 355 F. 2d 167 (5th Cir. 1965) (Air Force sergeant); *Harlow v. United States*, 301 F. 2d 361 (5th Cir.), cert. denied 371 U.S. 814 (1962) (civilian post exchange employee); *Fulks v. United States*, 283 F. 2d 259 (9th Cir. 1960), cert. denied 365 U.S. 812 (1961) (warehouseman); *Kemmler v. United States*, 133 F. 2d 235 (1st Cir. 1942) (physician).

criminate application of the subsection (a) definition and might well be avoided, so as to eliminate the obvious conflict between §201 and the Speech or Debate Clause. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). Moreover, it is an ordinary principle of statutory construction that if there are two possible interpretations of a statute, one of which would raise a question of constitutionality, and another which would not, then the construction which fairly avoids the constitutional question must be adopted. *International Association of Machinists v. Street*, 367 U.S. 740, 749 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). A reading of §201 which would disengage the "Member of Congress" definition from subsections (c) and (g), while relating it to the remaining provisions, would save the statute while honoring the Speech or Debate Clause.

However, if §201 is construed to permit prosecution of Members of Congress under subsections (c) and (g), then a collision with the Speech or Debate Clause would be clear and inevitable. Subsection (c)(1) creates an offense for any "public official" who "directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for (1) being influenced in the performance of any official act * * *." Subsection (g) also speaks in terms of a "public official" who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him * * *." The term "official act", as used in both subsections, is defined in subsection (a) to include "any decision or action on any question, matter, cause,

suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

This, it is argued, constitutes the "narrowly drawn statute" which warrants a departure from *Johnson*. We think not. A law review note, commenting upon the "sweeping terms" of these same statutory provisions, concluded: "The language [of §201] would seem to be as broad as the scope given to the Speech or Debate Clause." Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 341 n.42 (1965). To so construe it would render §201 plainly unconstitutional.

The significance of the foregoing observation appears in the fact that pages 347-348 of the same Yale Law Review note were cited in *Johnson* as the sole source of the "narrowly drawn statute" proposition. 383 U.S. at 185 n.15. When the Court mentioned this possibility, it evidently had the following passage in mind:

> Admittedly, the difficulty of defining bribery in the legislative context is greater than in the area of executive conflict of interest. The indispensability of campaign funds and the pressures of constituents combine to blur the boundary between legitimate and illegitimate action. However, the definition of the offense of bribery *need not* rest upon vague evidentiary foundations. A precise definition of bribery *could* require proof of a concrete and complete transaction. Conviction of the offense *could* be predicated upon proof of the passage of consideration and the performance of a service in addition to an agreement binding the bribee to act. The *possibility* of a tight definition of bribery *which would sharply reduce discretion afforded under existing statutes* indicates that there need not be an absolute immunity to bribery prosecutions.

Note, *supra* at 347-348 (italics added).

It is evident that the author had in mind an ideal to be pursued, not a goal already attained. All "existing statutes", obviously including §201, were conspicuously placed in the unacceptable category. Without pausing to contest the author's notion that Congress can impair the constitutional privilege by tight definitions of bribery, we reject as unfounded any suggestion that §201 is defined with such precision as to qualify as a "narrowly drawn statute". For example, the Note condemned its companion, 18 U.S.C. §203, punishing conflicts of interest, as constitutionally vague for reasons equally applicable to §201.

> [It] allows conviction for an agreement to receive compensation even when the bribed service has not been performed and even when consideration has not passed. Thus the statute leaves the jury free to convict essentially upon evidence of intent only. Standards for proof of intent are rather uncertain, and a Congressman might fear legitimately that honest conduct could be misinterpreted. Every conversation with a constituent interested in having his Congressman support legislation or urge change in executive policy could be suspect. *Id.* 347.

Turning to §201 itself, the Note declared that its provisions "present vagueness problems similar to those encountered under the conflict of interest provision." *Id.* 347 n. 76.

It is obvious that neither the Note nor *Johnson* contemplated §201 as a "narrowly drawn statute". Congress may have been invited to enact new legislation containing a "tight definition of bribery" so as to overcome vagueness problems depicted in the Note. Assuming that Congress may constitutionally do so, it has not yet responded to the invitation and §201 still remains a wide-ranging "general

criminal statute." *United States v. Johnson*, 383 U.S. 169, 185 (1966).

Historically, the federal bribery statute has been construed "in the broadest possible manner." *United States v. Glazer*, 129 F. Supp. 285, 286 (D. Del. 1955). See also *United States v. Birdsall*, 233 U.S. 223, 230-231 (1914); *Parks v. United States*, 355 F. 2d 167, 168 (5th Cir. 1965); *United States v. Raff*, 161 F. Supp. 276, 279 (M.D. Pa. 1958). According to the courts, legislation of this type is the very antithesis of a "narrowly drawn statute":

> If this statute be viewed solely from the standpoint of grammar and phraseology, it is quite striking how many broadening words are used in the statute: "in *any* official capacity," "*any* department or agency," "on *any* question, matter, cause, or proceeding", which *may at any time* be pending, "which *may* by law be brought before him." Consider the number of disjunctive or alternative persons, actions, or situations referred to: "an officer *or* employee of, *or* person acting for *or* on behalf of the United States", "any department *or* agency", "decision *or* action", "any question, department *or* agency", "decision *or* action", "any question, matter, cause, *or* proceeding which may at any time be pending, *or* which may by law be brought before him", "in his official capacity, *or* in his place of trust *or* profit". There is no verbal requirement that the matter be pending before the official at the time of the bribe. It is sufficient if it "may *at any time* be pending", or if it "*may* by law be brought before him" at some time in the future.
>
> Certainly, in the face of such sweeping language and the purpose it was designed to accomplish, we find no reason to find any intent on the part of Congress that the statute must be narrowly construed, to exclude any person or any conduct fairly within the broad statutory ambit. To this statute (and its companion, 18 U.S.C.A. §201), the federal courts have properly given an extremely liberal interpretation.

Wilson v. United States, 230 F. 2d 521, 524 (4th Cir.), cert. denied 351 U.S. 931 (1956) (italics in original).

When §201 was enacted in its present form as part of the 1962 revision, it did not restrict the broad sweep of these interpretations:

> "The bill does not limit in any way the broad interpretation that the courts have given to the bribery statutes; rather, the intent is to insure that this broad interpretation shall be given universal application." House Rep. 748, Comm. on the Judiciary, 87th Cong., 1st Sess. 17 (1961).

A reading of §201, its definitions and substantive language, and its interpretation by the federal courts negates any supposition that it can be viewed as "narrowly drawn" under any reasonable definition. If anything, its terminology is more sweeping than the provisions of 18 U.S.C. §371, the "general criminal statute" held ineffective to support proceedings against Congressman Johnson. Nor can we believe that Congress meant by enacting §201 to restrict the freedom of Congressmen acting within their traditional sphere of legislative activity. Cf., *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Reliance by the Government upon a general criminal statute so lacking in specificity and so susceptible of unconstitutional application, with a consequent chilling effect upon legislative conduct, underlines the insubstantiality of this appeal.

2. It is interesting that the Government should draw an analogy between the federal bribery statute, 18 U.S.C. §201, and legislation providing for trial of witnesses who behave contumaciously before a congressional investigatory committee. Because Congress has inherent power to punish a nonmember for contempt, in order to protect its institutional integrity, the Government asserts that Congress, of the power to discipline its members (Govt. Br. 25-26).

To equate judicial proceedings for contemptuous behavior against witnesses with judicial proceedings against Congressmen is to miscomprehend completely the Speech or Debate Clause. The fallacy in the argument is so apparent as to warrant no further discussion. But what is especially noteworthy is that Congress, in providing an alternative method of exercising its own power to punish for contempt, has enacted legislation which — in stark contrast to 18 U.S.C. §201 — exemplifies what indeed might be regarded as a "narrowly drawn statute."

In 1857, Congress enacted a statute, one section of which declared it to be a misdemeanor, punishable by fine and imprisonment, for a witness summoned by either House or any committee to refuse to answer questions upon any matter under inquiry. Act of January 24, 1857, c. 19, §1, 11 Stat. 155, now codified as 2 U.S.C. §192. Another section of the same statute,[95] now codified as 2 U.S.C. §194, states the manner in which the courts acquire jurisdiction over the contemnor. In its present form it provides as follows:

> Whenever a witness summoned as mentioned in Section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question * * * and the fact of such failure is reported to either House while Congress is in session, * * * it shall be the duty of the said President of the Senate or the Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

The provisions of §194 leave absolutely no doubt that a witness cannot be exposed to judicial proceedings without

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[95] Act of January 24, 1857, c. 19, §3, 11 Stat. 155.

affirmative action — report and certificate — by the aggrieved House. *In re Chapman*, 166 U.S. 661, 667 (1897). Unlike the federal bribery statute, it does not entrust matters to the unbridled discretion of the executive or to the suspicions of a grand jury. The latter is denied all authority to inquire into contempts before either House of Congress unless and until the House of Congress itself has acted.[96] Practice under §194 has demonstrated "beyond any doubt that the House and the Senate have consistently considered, and occasionally debated at length, resolutions authorizing the Speaker of the House or the President pro tempore of the Senate to certify under the statute. Votes have often been cast against such resolutions." *Wilson v. United States*, 369 F. 2d 198, 201 (D.C. Cir. 1966).[97]

As the *Wilson* case makes clear, the federal courts will not entertain a citation under §194 where it is obvious that the certifying House has not considered the citation on its merits. In *Wilson* the action of the Speaker of the House was held invalid and a conviction was reversed because the Speaker failed to make appropriate inquiry of the House before certifying to the United States attorney. The court held that the Speaker was not under a "mandatory" duty to certify until the House involved had considered *on the merits* a report of the committee before which the witness had appeared. A thorough review of legislative history disclosed a desire on the part of each House to monitor contempt citations as a "check on hasty action"

[96] *Ex parte Frankfeld*, 32 F. Supp. 915, 916-917 (D.D.C. 1940). Section 194 "requires a certification of the facts to the appropriate United States Attorney who is charged with bringing the matter before the grand jury," thereby signifying "that the Senate has elected to have the contempt punished as a misdemeanor." *United States v. Costello*, 198 F. 2d 200, 205 (2d Cir.), cert. denied 344 U.S. 874 (1952).

[97] For example of such a debate prior to a certifying resolution, see *United States v. Rumely*, 345 U.S. 41, 47-48 (1953).

and to promote "reflection within the legislative branch" upon matters certified. *Id.* 203.

In short, §194 embodies a deliberative concept which is utterly lacking here:

> [P]rosecution would not be begun without the additional scrutiny within the legislative branch, a scrutiny that would at least embrace examining the sufficiency of the statement of facts of alleged contempts, and consideration whether the incident constitutes the kind of wilful contumacy contemplated by the statute, or perhaps whether the matter is sufficiently dubious so that no contempt action should be begun in the absence of approval by the entire House. *Id.* 204.[98]

Rather than being a "check on hasty action", the federal bribery statute is now being treated by the Government as a blank check — for the executive to initiate prosecution, for the grand jury to inquire into, and for the trial jury to pass judgment upon the legislative acts and motivations of a United States Senator. The Senate itself has been excluded from all deliberations. We refuse to indulge in the belief that the Houses of Congress, by joining in the enactment of the federal bribery statute, intended to abdicate their historic trust under the Speech or Debate Clause.

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[98] In *Kinoy v. District of Columbia*, 400 F. 2d 761 (D.C. Cir. 1968), the Government initiated a prosecution for misbehavior before a House subcommittee without first obtaining the mandate of the House. Reversing the conviction, the Court of Appeals observed: "Where a participant in a legislative hearing behaves in such a manner as to raise a question as to the propriety of his behavior, the *initial* determination that criminal proceedings should be instituted against that party ordinarily lies with the body before which he is appearing, not an independent tribunal." *Id.* 764 (court's italics). *Wilson* was cited. *Id.* 400 F. 2d at 765 n.6.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal should be dismissed for want of jurisdiction or, in the alternative, that the judgment of the District Court be affirmed.

Respectfully submitted,

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